89-640

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 88-5397

NATIONAL WILDLIFE FEDERATION, APPELLANT

v.

ROBERT F. BURFORD, ET AL.

No. 88-5291

NATIONAL WILDLIFE FEDERATION

v.

ROBERT F. BURFORD, ET AL.

Appeal of ASARCO INCORPORATED,
Applicant for Intervention

Decided June 20, 1989

Before: EDWARDS and RUTH BADER GINSBURG, Circuit Judges, and KAUFMAN, Senior Judge.

• Of the United States District Court for the District of Maryland, sitting by designation pursuant to 28 U.S.C. § 294(d).

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS

HARRY T. EDWARDS, Circuit Judge:

In July 1985, appellant National Wildlife Federation ("NWF" or "Federation"), a nonprofit natural resources conservation and education association with over 4.5 million members, brought suit to challenge a Department of Interior ("Interior" or "Department") decision to reclassify the status of approximately 180 million acres of public land. The present appeals involve two decisions arising out of NWF's suit. First, on November 4, 1988—after extended preliminary proceedings, including the issuance of a preliminary injunction enjoining Interior's challenged activity, which was upheld by this court in *National Wildlife Federation v. Burford,* (*"Burford I"*), 835 F.2d 305 (D.C.Cir.1987), and various actions by the trial court amending the original injunction—the District Court granted Interior's motion for summary judgment on the ground that NWF lacked standing. NWF now appeals from that decision. Second, ASARCO, Inc. ("ASARCO"), a producer of nonferrous metals, appeals the District Court's denial of its motion to intervene. The District so ruled because it found ASARCO's motion to be untimely filed.[1]

On the first appeal, No. 88-5397, we adhere to the holding of the court in *Burford I* that NWF "has alleged injury in fact sufficient to establish standing to pursue its . . . claims against the Department," 835 F.2d at 314, and we conclude that the record before us is more than ade-

[1] These cases were argued separately before this court. NWF's appeal was docketed as case No. 88-5397, and ASARCO's as No. 88-5291. We have consolidated the two cases for decision because of the unity of the substantive issues underlying these procedural appeals.

quate to allow NWF to survive a motion for summary judgment on standing. Therefore, we reverse the judgment of the District of Court and remand for a determination on the merits.[2]

On the second appeal, No. 88-5291, we reverse the District Court's denial of ASARCO's motion to intervene with respect to one of ASARCO's claims, because we find that the motion was timely filed. We remand this portion of the case to the District Court to allow it to consider whether ASARCO's intervention is presently warranted.

I. BACKGROUND

A. *Standing of the National Wildlife Federation*

NWF filed suit under the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.* (1982); the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* (1982); and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.* (1982), challenging Interior's ongoing "Land Withdrawal Review Program" ("Program"). The Program primarily involves the termination of land "withdrawals" and "classifications," the two main vehicles through which Interior establishes and implements land use planning for millions of acres of federal public lands. "Classifications" allow Interior to categorize lands for specific usage, and frequently designate public lands for retention, thereby segregating them from the scope of various land disposal laws. "Withdrawals" directly remove designated public lands from disposal under the general land laws. The Program is implemented by the Bureau of Land Management ("BLM"), a subagency of Interior.

[2] We find it unnecessary to reinstate the preliminary injunction because the case should now proceed directly to the merits.

Pursuant to the Program, the Department, relying on its authority under the FLPMA,[3] lifted protective restrictions from nearly 180 million acres of federal land located in seventeen states. According to the Assistant Director of Land Resources for the BLM, over thirteen million acres of public lands that previously were closed to some or all types of mining are now open to be mined by private parties as a result of these classification and withdrawal terminations, *see* Affidavits of BLM Assistant Director Frank Edwards, Joint Appendix ("J.A.") 75, 102-03, and another eight million acres are now open for mineral leasing, *Burford I*, 835 F.2d at 324-25. Hundreds of leases and sales have already been effectuated or are pending for mining, mineral leasing, agricultural, commercial, and other proposed developmental uses. *See id.*

NWF filed suit challenging the Program on July 15, 1985, simultaneously moving for preliminary injunctive relief. On December 4, 1985, the District Court granted NWF's motion for a preliminary injunction, enjoining Interior from issuing any new "withdrawal revocations" or "classification terminations" and from engaging in any activities inconsistent with extant withdrawals and terminations. *National Wildlife Federation v. Burford*, 676 F.Supp. 271 (D.D.C.1985).[4]

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[3] Until enactment of the FLPMA, terminations of classifications and withdrawals could be effected only by the President. However, in 1976, Congress enacted FLPMA § 202(d), 43 U.S.C. § 1712(d) (1982), which authorized the BLM to modify or terminate its previous classifications and withdrawals. The Program was thus enacted pursuant to the FLPMA and is subject to that statute's other substantive management criteria. *See, e.g., id.* §§ 1701, 1712, 1714.

[4] On February 10, 1986, pursuant to the defendants' motion to clarify, the District Court modified the injunction to make clear that it reached only the federal defendants and not absent third parties, and that it was not intended "to overturn or in any way to upset fee interests." *National Wildlife Federation v. Burford*, 676 F.Supp. 280, 284 (D.D.C.1986). The original injunction was subsequently amended three more times prior to this appeal to further limit the reach of the injunction.

On December 11, 1987, a panel of this court affirmed the District Court's grant of preliminary relief. *See Burford I, supra*. This court first addressed preliminary matters such as standing, the effect on absent third parties, and exhaustion, *see* 835 F.2d at 310-18, and concluded "that the Federation has alleged facts that demonstrate that the actions of the Department threaten to harm the cognizable interests of the Federation's members. Consequently, we find that the Federation has alleged injury in fact sufficient to establish standing to pursue its two FLPMA claims against the Department." *Id.* at 314. Passing to the merits, the court in *Burford I* held that the Federation had satisfied the burden of proof necessary to sustain a preliminary injunction. Conceding that this was a "close" case, *id.* at 319, the court nevertheless held that the District Court had not abused its discretion in finding that NWF had shown a likelihood of success on the merits, *see id.* ast 327.[5]

Following this court's remand in *Burford I*, and during subsequent pre-trial proceedings before the District Court, NWF complained of the same specific injury from the Program's reclassifications that it had cited in its motion for the preliminary injunction. First, NWF claimed that its many members who "use and enjoy the environmental resources that will be adversely affected by the challenged

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[5] Subsequently, in the course of denying another motion, a panel of this court exhorted the District Court to proceed with the litigation "with dispatch" because millions of acres of land were "on hold" due to a preliminary injunction issued only on the basis of brief affidavits and other cursory materials, *see National Wildlife Federation v. Burford*, 844 F.2d 889, 890 (D.C.Cir.1988) (per curiam).

actions" would be deprived of such use by the development of these lands. Brief for Appellant NWF at 10. Second, NWF complained that the organization and its members had been injured by being denied "information on the potential impacts of defendants' actions" as well as "the opportunity to participate in defendants' decision-making." *Id.* In support of these complaints, NWF resubmitted to the trial court the affidavits of two of its members, Peggy K. Peterson, *see* J.A. 209, and Richard L. Erman, *see* J.A. 205, and the sworn declaration of its Vice-President for Resources Conservation, Lynn A. Greenwalt, *see* J.A. 212. Two of these same affidavits had been ruled sufficient to establish standing for the purposes of a preliminary injunction by both the District Court itself and by this court in *Burford I.*

Both sides moved for summary judgment; the matter was extensively briefed and oral argument was heard on the motions on July 22, 1988. After oral argument, the District Court directed both sides to submit additional memoranda by August 22, 1988, on the issue of NWF's standing to bring suit. Both parties complied with this order, but the trial court then declined to consider certain of the additional material submitted by the Federation. The court stated that it found these submissions, which included "declarations from four of its members," to be "evidentiary material," submitted "in addition to [NWF's] memorandum filed August 22, 1988." Because it found these submissions to be "untimely and in violation of our Order," it "decline[d] to consider them." *National Wildlife Federation v. Burford,* 699 F.Supp. 327 (1988), *reprinted in* J.A. 367, 370 n. 3 [hereinafter "Memorandum Opinion"].

In the same Memorandum Opinion, issued on November 4, 1988, the District Court also dismissed the case for lack of standing and lifted the preliminary injunction. The court acknowledged that NWF had established standing in the prior proceedings before the court of appeals because "the issue of standing arose in the posture of defendant's motion to dismiss." Memorandum Opinion, J.A. 370. On a motion to dismiss, the trial court reasoned, an appellate court had to assume the complaint's allegations to be true and had to construe them in a light most favorable to the organization. *See id.* (citing *Burford I,* 835 F.2d at 312; *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975)). The District Court opined that Supreme Court and subsequent D.C. Circuit precedent mandated that more specific injury-in-fact must be shown to sustain standing on a motion for summary judgment than to sustain standing on a motion to dismiss. *See Memorandum Opinion, J.A. 370-71 (citing United States v. Students Challenging Regulatory Agency Procedures ("SCRAP"),* 412 U.S. 669, 689 & n. 15, 93 S.Ct. 2405, 2417 & n. 15, 37 L.Ed.2d 254 (1973)); *Wilderness Society v. Griles,* 824 F.2d 4, 16-17 (D.C.Cir.1987). The trial court, however, failed to give due weight to the fact that the panel in *Burford I* held that NWF had established standing for purposes of a preliminary injunction, and not merely to survive a motion to dismiss.

Reconsidering its initial finding of standing in light of what it saw as this more demanding *SCRAP/Griles* standard, the trial court concluded that the affidavits submitted by NWF were insufficient evidence of injury-in-fact to sustain standing. The court rejected the affidavit of NWF Vice-President Greenwalt as "conclusory and completely devoid of specific facts." Memorandum Opinion, J.A. 374. Turning to the Peterson and Erman affidavits, the court noted that these presented the issue of so-called "third-party" injury—that is, injury to the plaintiff that is caused by the future conduct of a third party (in this case,

a mining company), in response to defendant's action, rather than by the direct action of the defendant. The court therefore defined the standing issue as "whether the plaintiff has put forward enough facts to show that his intended behavior will be injured as a direct or indirect result of the challenged governmental action." *Id.*, J.A. 375 (quoting *Griles*, 824 F.2d at 12). The trial court concluded that the Peterson and Erman affidavits were "vague, conclusory and lack[ed] [the] factual specificity. . . . [to] show 'injury in fact.'" *Id.*, J.A. 378. Specifically, the court found that, because Peterson claimed only that she uses lands "in the vicinity" of the South Pass-Green Mountain area of Wyoming for recreation, the affidavit was not specific enough to show that her use and enjoyment extended to the *particular* 4500 acres that would be affected by the challenged Department termination within the described two million acre area. The court found the Erman affidavit to be "similarly flawed" with respect to the Arizona lands it addressed. *See id.*, J.A. 377. This appeal followed.

B. *ASARCO's Motion to Intervene*

Under one classification that the Program terminated, 31,000 acres of federal land in central Oregon were withdrawn from private appropriation, including the location of mining claims. Pursuant to this classification termination, the BLM permitted ASARCO, whose business includes the exploration and development of mineral interests through mining claims on federal lands throughout the Western United States, to stake mining claims on some of these lands from November 1987 through January 1988. These claims are known as the "Spanish Gulch" claims. However, because of the order of the District Court enjoining the post-1981 terminations, the BLM

subsequently notified ASARCO by letter dated March 21, 1988, that its Spanish Gulch claims were null and void. The letter explained that as of February 10, 1986, and continuing until the injunction was lifted or modified, the BLM could not open the Spanish Gulch lands to private mining claims. *See* ASARCO Appendix ("A.A.") 30-31.

On June 6, 1988, ASARCO moved to intervene as a defendant in the NWF action.[6] ASARCO maintained that the scope of NWF's complaint and the application of the preliminary injunction did not extend to some interests in federal land, including ASARCO's Spanish Gulch claims.[7] Although ASARCO's motion to intervene was filed three years after the filing of NWF's original suit, and two-and-a-half years after the issuance of the District Court's preliminary injunction, it was filed less than three months after ASARCO was notified by Interior that its Spanish Gulch claims were directly affected by this litigation.

On July 22, 1988, the same day the District Court heard oral argument on the cross-motions for summary judgment in the ongoing NWF suit against the Government, the trial court also denied ASARCO's motion to intervene "into this longstanding litigation," stating that the motion was untimely under Rule 24 of the Federal Rules of Civil Procedure.[8] *See National Wildlife Federation v. Burford,*

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[6] ASARCO also appealed the BLM's determination to the Interior Board of Land Appeals.

[7] ASARCO based this argument on the fact that some land classifications, including the Spanish Gulch claims, had already terminated by operation of law well before 1981, under the now-expired Classification and Multiple Use Act of 1964, so that the preliminary injunction could not encompass these terminations.

[8] ASARCO sought a stay of the District Court's order pending its appeal. By order dated September 6, 1988, the District Court denied the stay, finding that ASARCO's then-asserted interests were already adequately represented by existing parties to the litigation, that the

No. 85-2238 (D.D.C. July 22, 1988), *reprinted in* A.A. 39. As noted above, the District Court subsequently dismissed the Federation's case for lack of standing and simultaneously dissolved the preliminary injunction from which ASARCO claimed injury. ASARCO appealed, subject to this court's disposition of NWF's appeal in the primary case.

II. ANALYSIS

A. *Standing of the National Wildlife Federation*

It is well settled that an organization may have standing to bring suit on behalf of its members. *See International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock ("UAW v. Brock")*, 477 U.S. 274, 281-90, 106 S.Ct. 2523, 2528-29, 91 L.Ed.2d 228 (1986); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). In *Hunt*, the Supreme Court determined that an organization seeking to pursue members' claims in a representational capacity may do so if

> (a) [one or more of the organization's] members would otherwise have standing to sue in their own right; (b) the interests [the organization] seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. at 343, 97 S.Ct. at 2441. *See also Burford I*, 835 F.2d at 311. At issue in the instant case is only the first of

motion to intervene was untimely, and that further postponement of the case "would be harmful to the parties and the public." *National Wildlife Federation v. Burford*, No. 85-2238, slip op. at 2 (D.D.C. Sept. 6, 1988).

the *Hunt* factors; no one disputes that the last two requirements have been met.[9] Thus, the crux of the standing issue in this case is whether Federation members would have standing to sue in their own right.

Article III of the Constitution limits the rights of individuals to seek judicial redress by extending the "judicial power" of the United States only to the resolution of "cases" and "controversies." U.S. CONST. art. III, § 2. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982), the Supreme Court described the scope of these limitations as follows:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern*

[9] To wit, first, NWF seeks to protect its members' interests in preserving the environmental resources that will be adversely affected by the Interior action. These interests are germane to NWF's purposes, which include natural resource preservation and conservation. Second, there is no reason to require individual Federation members to participate in this case. Courts have generally required individual participation only when there are conflicts of interest within an organization, *see, e.g., Harris v. McRae*, 448 U.S. 297, 320-21, 100 S.Ct. 2671, 2689-90, 65 L.Ed.2d 784 (1980), or when individual participation in a suit is needed in order to make damage determinations, *see, e.g., Warth*, 422 U.S. at 515-16, 95 S.Ct. at 2213-14.

Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976).

Of these three constitutional standing components—injury-in-fact, causation, and redressability—the District Court in the case before us rested its denial of standing only on the first. It found that NWF had not demonstrated the requisite injury-in-fact, because NWF's affidavits did not evidence a particular showing of injury. We disagree and reverse this finding.[10]

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[10] Defendant-intervenor Mountain States Legal Foundation ("Mountain States") raises several other challenges to NWF's standing in addition to the injury-in-fact challenge. These involve the causation and redressibility requirements for constitutional standing, and the prudential "generalized grievance" limitation on standing—*i.e.*, that the injury must not be a generalized grievance about the conduct of government, since these are most appropriately addressed in the representative branches. *Warth*, 422 U.S. at 499-500, 95 S.Ct. at 2205; *Center for Auto Safety v. National Highways Traffic Safety Admin.*, 793 F.2d 1322, 1335 (D.C.Cir.1986). We reject these other standing claims.

To begin with, there is no doubt that any injury alleged by NWF is caused by, and could be easily redressed by, the Department's modification of its plans under the Program. Mountain States argues that the injury to NWF members will not be caused directly by the Government but, rather, by mining and other development companies affected by regulations under the Program. Therefore, according to Mountain States, because NWF has not alleged facts sufficient to identify any adverse action that will be taken by these companies, plaintiff's injury is not "fairly traceable" to that action, nor is it "likely to be redressed" by an order binding the Government. It is understandable why neither the District Court in its decision below nor the Government on this appeal endorses Mountain States' position, for it is patently flawed.

Once the lands in dispute are removed from Government regulation or protection under the Program, and made available for private mining and other developmental uses, NWF will have no claim against those in control of the land development projects. Furthermore, to the extent that evidence regarding private developmental uses is relevant,

1. Injury-in-Fact

NWF claims it is entitled to judicial review under section 10(a) of the APA, 5 U.S.C. § 702 (1982).[11] Injury-in-fact analysis under the APA mirrors that required by the Constitution. *See Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 667 (D.C.Cir.1987). This injury-in-fact requirement is satisfied by the presence of a "distinct and palpable injury." *Warth*, 422 U.S. at 501, 95 S.Ct. at 2206; *see also Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1331 (D.C.Cir. 1986). The injury may result from invasion of a statutory

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it has already been addressed by this court in *Burford I*. Based on both the challenged NWF affidavits and the sworn statements of Government officials delineating the precise scope of pending third-party activity in response to the Program, this court specifically rejected the argument now advanced by Mountain States. *See Burford I*, 835 F.2d at 313-14, 324-25. The relevant portion of that opinion has not been called into question or resisted in any way by any litigant. The intervenor has offered no valid basis for reconsideration of our earlier rejection of this argument, and the Government has not even seen fit to raise the issue. Intervenor's position obviously lacks any merit, and we accordingly reject it.

Nor do we find any merit in the intervenor's claims that the Federation should be denied standing under the prudential "generalized grievance" principle. It is plain in this case that NWF has not based its claim on any generalized grievance about the Government's activities, but rather on the concrete injury to its members. The Supreme Court has "made it clear that standing is not to be denied simply because many people suffer the same injury." *SCRAP*, 412 U.S. at 687, 93 S.Ct. at 2416. As long as there is a "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast v. Cohen*, 392 U.S. 83, 102, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947 (1968), plaintiffs will have met the "generalized grievance" criteria. We find that, on the facts of this case, NWF has alleged such a "logical nexus."

[11] Section 702 gives the right of judicial review to a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."

right as well as a constitutional one, *see, e.g., Schlesinger v. Reservists Comm. to Stop The War*, 418 U.S. 208, 224 n. 14, 94 S.Ct. 2925, 2934 n. 14, 41 L.Ed.2d 706 (1974); *Sierra Club v. Morton*, 405 U.S. 727, 732 & n. 3, 92 S.Ct. 1361, 1365 & n. 3, 31 L.Ed.2d 636 (1972), but it must be more than merely "abstract" or "conjectural" to suffice, *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). The injury need not be important or large; an "identifiable trifle" can meet the constitutional minimum. *SCRAP*, 412 U.S. at 689 n. 14, 93 S.Ct. at 2417 n. 14. "And an injury shared by a large number of people is nonetheless an injury." *Center for Auto Safety*, 793 F.2d at 1331 (citing *Sierra Club*, 405 U.S. at 734, 92 S.Ct. at 1366).

Elaborating on the injury-in-fact standard, the *Burford I* court explained that "[t]he Federation must allege facts demonstrating a definable and discernible injury to its members and an adequate connection between that injury and the members. *See* [*SCRAP*, 412 U.S. at 688-89, 93 S.Ct. at 2416]. The personal injury may be 'actual or threatened.' [*Valley Forge*, 454 U.S. at 472, 102 S.Ct. at 758]." 835 F.2d at 311. The *Burford I* court then analyzed "a pair of environmental lawsuits relevant to this case," *id.*, handed down by the Supreme Court that elaborate on the requirement in this context. In *Sierra Club*, the Court denied standing to the Sierra Club on its allegation that the Government's decision to permit development of a quasi-wilderness national park would "destroy or . . . adversely affect" the natural resources in the park and would "impair . . . enjoyment . . . for future generations." 405 U.S. at 734, 92 S.Ct. at 1366. Although acknowledging that this was a cognizable injury, the Court nonetheless found that it did not amount to injury-in-fact sufficient to uphold standing because the Sierra Club had "failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development." *Id.* at 735, 92 S.Ct. at 1366. In contrast, the Court found in *SCRAP* that the plaintiff-organization had established standing to challenge an ICC rate increase. No doubt tailoring its complaint to conform with the decision in *Sierra Club*, the *SCRAP* plaintiffs had alleged that their members used "the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area" for various recreational and aesthetic purposes, and that these uses would be disturbed by a chain of third-party responses to the challenged agency action. *SCRAP*, 412 U.S. at 678, 93 S.Ct. at 2411. The *Burford I* court summarized the teachings of these cases as making "clear that in order to establish injury in fact for representational standing, an organization must allege facts showing that one or more of its members is among the persons injured by the challenged agency action." 835 F.2d at 311.

The affidavits submitted by the Federation in this case clearly alleged facts showing that its members were "among the persons injured" by Interior. Thus, we hold that in this case as pleaded on July 22, 1988, *i.e.*, at the time of the District Court's hearing on the cross-motions for summary judgment, NWF demonstrated sufficient detail of injury-in-fact to survive a motion for summary judgment on standing grounds. In other words, even leaving aside the applicable law of the case established by this court in *Burford I*, *see* Part II.A.2 *infra*, and the supplemental affidavits submitted by petitioners after the hearing on the motions for summary judgment, *see* Part II.A.3 *infra*, there was enough detail in support of standing to raise material issues of fact sufficient to require the trial judge to consider the case on the merits. In fact, the original Peterson affidavit alone raised "genuine issue[s] [of] material fact," Fed.R.Civ.P. 56(c), with respect to the

standing issue, enabling petitioners to survive a motion for summary judgment.[12]

Peterson's affidavit stated:

> My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened up to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

J.A. 210. The District Court found this statement not to be specific enough because the Interior

> decision [to open the South Pass-Green Mountain area of Wyoming to mining claims and oil and gas leasing] opened up to mining approximately 4500 acres within a two million acre area, the balance of which, with the exception of 2000 acres, has always been open to mineral leasing and mining. . . . There is no showing that Peterson's recreational use and enjoyment extends to the particular 4500 acres covered by the decision to terminate classification.

Memorandum Opinion, J.A. 376-77.

[12] As a preliminary matter, we note the District Court's finding that standing alone, the [Peterson and Erman] affidavits do not provide any basis for standing to challenge, as violative of the Federal Land Policy Management Act, the legality of *each* of the 1250 or so individual classification terminations and withdrawal revocations.

J.A. 378 (emphasis added). As we stated in *Burford I, see* 835 F.2d at 324, to the extent that this summarizes the trial court's reasoning, it reflects an erroneous application of law. The applicable law governing standing requires that plaintiffs be injured by only *one* of the terminations. *See UAW v. Brock,* 477 U.S. at 282-86, 106 S.Ct. at 2529-31; *Warth,* 422 U.S. at 511, 95 S.Ct. at 2211.

On the record of this case, the trial court's reasoning does not support the result reached. Interior planned to open to leasing all but 2000 of the remaining unleased 6500 acres in a two million acre area. The language of Peterson's affidavit can be read to *presume* that the 4500 newly opened areas included the areas that Peterson uses; otherwise, *her* use and enjoyment would not be "adversely affected" in any way. In other words, the universe of the land to which Peterson's affidavit refers can only encompass the 6500 acres that was not yet opened to mining and leasing claims. Of these 6500 acres, only 4500 are affected by the Program. If Peterson was not referring to lands in this 4500-acre affected area, her allegation of impairment to her use and enjoyment would be meaningless, or perjurious. The District Court in no way questions the *veracity* or *clarity* of the affidavit, only its *specificity. Cf. SCRAP,* 412 U.S. at 689, 93 S.Ct. at 2416 (court will not consider whether allegations in affidavits are untrue unless alleged by opposing party). But the trial court overlooks the fact that unless Peterson's language is read to refer to the lands affected by the Program, the affidavit is, at best, a meaningless document.

At a minimum, Peterson's affidavit is ambiguous regarding whether the adversely affected lands are the ones she uses. When presented with ambiguity on a motion for summary judgment, a District Court must resolve any factual issues of controversy in favor of the non-moving party, even when the issue of harm and the issue on the merits are intertwined. *See Better Gov't Ass'n v. Department of State,* 780 F.2d 86, 94 (D.C.Cir.1986); *International Ladies' Garment Workers' Union v. Donovan,* 722 F.2d

795, 810 (D.C.Cir.1983); *accord National Wildlife Federation v. Snow*, 561 F.2d 227, 236-37 (D.C.Cir.1976). This means that the District Court was obliged to resolve any factual ambiguity in favor of NWF, and would have had to assume, for the purposes of summary judgment, that Peterson used the 4500 affected acres. Accordingly, we find that Peterson has alleged injury-in-fact sufficient to give her standing to sue, and therefore that NWF also has standing under the *Hunt* criteria.[13]

2. The Law of the Case

Furthermore, and equally importantly, our decision on this appeal is precisely in accord with what another panel of this court found the first time this case was heard on appeal in *Burford I*. The *Burford I* court held that "the affidavits supplied by the Federation specifically identify locations where its members' interests are threatened by the Department's actions in lifting restrictions on mining and other forms of natural resource exploitation." 835 F.2d at 325. The affidavits referred to by the court are the *very*

[13] Because we find the Peterson affidavit to be adequate support for the standing claim, it is unnecessary for us to decide whether the Erman and Greenwalt affidavits, both of which differ somewhat from Peterson's, are specific enough to merit standing. *See Sierra Club*, 405 U.S. at 740 n. 15, 92 S.Ct. at 1369 n. 15, ("The test of injury in fact goes only to the question of standing to obtain judicial review"; once standing is established, "the party may assert the interests of the general public in support of his claims for equitable relief."); *Sierra Club v. Adams*, 578 F.2d 389, 392 (D.C.Cir.1978).

We only note here that the *Burford I* court found that the Federation had demonstrated injury-in-fact based on both the Erman and Peterson affidavits. *Burford I*, 835 F.2d at 314; *see also id.* at 329-30 (Williams, J., concurring and dissenting in part) (noting that intervenor Mountain States conceded in oral argument that "some of the acreage opened to mining was in the vicinity of lands used by [Erman] in Arizona"). *See also* Part II.A.2 *infra*.

same ones that we now review; the *Burford I* court expressly held they provided adequate grounds for NWF to establish irreparable harm at the preliminary injunction stage. Even Judge Williams, concurring in part and dissenting in part from *Burford I*, agreed that the record established NWF's standing, albeit "minimally." 835 F.2d at 329-30. For another panel of this court subsequently to contradict this express finding when circumstances have not changed would contravene the law of the case. *See* 2B MOORE'S FEDERAL PRACTICE ¶ 0.404[1] at 119 ("[w]hen a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand") (emphasis in original); *Doe v. New York City Dep't of Social Serv.*, 709 F.2d 782, 788-89 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983).

We recognize that *Burford I* analyzed the showing necessary to survive a challenge to standing on a motion to dismiss, which was the posture of this case when it was first appealed. The Government now argues that, because the majority opinion in *Burford I* discussed standing in connection with a motion to dismiss, 835 F.2d at 312, the court never confronted the *Griles* test, which sets a somewhat higher standard for obtaining standing on a motion for summary judgment than on a motion to dismiss. *See Griles*, 824 F.2d at 16 ("[W]hile a motion to dismiss may be decided on the pleadings alone, construed liberally in favor of the plaintiff, a motion for summary judgment by definition entails an opportunity for a supplementation of the record, and accordingly a greater showing is demanded of the plaintiff."). However, what is critical for purposes of review here is that the court in *Burford I* also found standing to support the District Court's grant of a preliminary injunction in favor of petitioners.

The Government's argument completely fails to recognize that, in this case, the burden of establishing irreparable harm to support a request for a *preliminary injunction* is, if anything, *at least as great* as the burden of resisting a *summary judgment motion* on the ground that the plaintiff cannot demonstrate "injury-in-fact." To obtain a preliminary injunction, NWF not only had to demonstrate specific harm, but also carry the *burden of persuasion,* showing a likelihood of success on the merits. On a motion for summary judgment, a plaintiff need only create a jury issue.

When the *Burford I* court found standing to support a preliminary injunction, it also found sufficient injury-in-fact to support the test of standing under *Griles*. As Judge Williams' separate opinion states, "*the specificity required for standing allegations to secure a preliminary injunction will normally be no less than that required on a motion for summary judgment.*" 835 F.2d at 328 (emphasis added). To the extent that *Griles* requires a higher degree of specificity to show injury-in-fact for standing at the summary judgment stage than would be required on a motion to dismiss, the court in *Burford I* found this burden to be met in upholding petitioners' standing to secure a preliminary injunction. The *Burford I* decision upholding petitioners' standing is therefore the law of the case, which disposes of this appeal.

3. The Supplemental Affidavits

Because *Burford I* expressly found that petitioners had satisfied the standing requirements, there was no reason for petitioners to suspect that there remained any standing question on remand. If the District Court felt that the standing question was still open, or that more information was required to assess the issue, then it could have permitted petitioners to supplement the record. *See Griles,* 824 F.2d at 17 n. 10 ("a district court can assure that appropriate extra-pleading materials are consulted in determining the threshold jurisdictional issue"). The law of this circuit allows plaintiffs to supplement the record to cure alleged defects on standing. *See, e.g., National Wildlife Federation v. Hodel,* 839 F.2d 694, 703 (D.C.Cir.1988). The equities of this case unquestionably compel such an allowance: the papers on which the trial court relied were two years old by the time it requested supplemental memoranda on the standing issue, and there was no indication prior to the trial court's request that NWF should have doubted the adequacy of the affidavits it had already submitted. Moreover, appellees had full opportunity to refute the evidence in these affidavits; the District Court had specifically given appellees ten days to file "any opposition" to NWF's supplemental memorandum. J.A. 345. In this context, we find that it was unfair and an abuse of discretion for the trial court to refuse to consider the affidavits submitted by NWF when the court asked for supplemental memoranda on the standing issue.

No party to this litigation seriously disputes that NWF's supplemental affidavits, if considered, easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests. Thus, even if the original affidavits were insufficient, and even if we assume that this court's decision in *Burford I* did not decide the issue, these supplemental affidavits offer enough detail to establish NWF's standing.[14]

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[14] In light of our decision that the Federation has standing to sue in its own right, it is unnecessary to consider whether plaintiff-intervenor Congressman Bruce Vento also has standing, or whether his standing claims are interdependent with those of the Federation in any way. Congressman Vento has separately appealed the dismissal of his case.

B. ***ASARCO's Motion to Intervene***

The District Court found ASARCO's intervention claim to be untimely under Rule 24(a) of the Federal Rules of Civil Procedure, which provides that a party may intervene as a matter of right if, *inter alia,* the motion to intervene is timely filed.[15] We disagree with the trial court's finding only with respect to the Spanish Gulch claims, for ASARCO acted promptly to intervene in the suit as soon as the BLM construed the District Court's preliminary injunction order to invalidate these claims. However, we agree with the District Court on ASARCO's other, more general claims.

The timeliness of a motion to intervene does not depend solely on "the amount of time which has elapsed since the litigation began [but] . . . also [on] . . . the related circumstances, including the purpose for which intervention is sought . . . and the improbability of prejudice to those already parties in the case." *Hodgson v. United Mine Workers of America,* 473 F.2d 118, 129 (D.C.Cir.1972); *see also NAACP v. New York,* 413 U.S. 345, 366, 93 S.Ct. 2591, 2603, 37 L.Ed.2d 648 (1973) (whether a motion to intervene is timely "is to be determined from all the circumstances"); *Natural Resources Defense Council v. Costle,* 561 F.2d 904, 907 (D.C.Cir.1977).

In this case, the salient factor is not when ASARCO's motion to intervene was filed with respect to the filing of NWF's original suit, or even with respect to the District Court's issuance of the preliminary injunction. Rather, the

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[15] Fed.R.Civ.P. 24(a)(2) also requires that the applicant must claim an interest relating to the property that is the subject of the action; must show that the judicial disposition of the action may impair or impede the applicant's ability to protect its interest; and must show that the applicant's interests are not adequately represented by existing parties.

relevant time from which to assess ASARCO's right of intervention is when ASARCO knew or should have known that any of its rights would be directly affected by this litigation. The record indicates without refutation that ASARCO filed its motion to intervene on June 6, 1988, only 73 days after it received the March 21, 1988, letter from Interior through which ASARCO actually discovered that its Spanish Gulch claims were suspended by the preliminary injunction. Thus, the only remaining question is whether ASARCO can be ascribed with constructive notice before this event. Nothing in the record before us indicates that this question could be answered in the affirmative.

The only possible event that might be construed to have put ASARCO on notice that its interests were at stake in this case would be the February 10, 1986, publication of the preliminary injunction order in the *Federal Register.* However, as the opinion of the District Court notes, the publication in the *Federal Register* was not specific enough vis-a-vis the exact lands affected to "alert even the most careful reader that defendants' classification determinations should inspire protest." *National Wildlife Federation v. Burford,* 676 F.Supp. at 282. Thus, there was no way that this publication could have given ASARCO notice that its Spanish Gulch claims were in jeopardy.

It is clear, then, that ASARCO could not have been required to intervene to protect its Spanish Gulch claims before it received the letter from the BLM notifying it that these claims would be disrupted. Accordingly, we reverse the District Court's finding that ASARCO's intervention with respect to these claims was untimely. We do agree with the District Court, however, that any other generalized claims (besides the particularized Spanish Gulch claims) that ASARCO wished to raise in this litigation should have been brought in a timely fashion after the

Federal Register publication of these proceedings; this publication provided sufficient notice of the agency action to arouse any *general* challenges ASARCO may have had. We therefore hold that ASARCO is entitled to bring only its Spanish Gulch claims in District Court because only these claims were timely filed.

We emphasize that we find only that ASARCO's Spanish Gulch claims were timely filed. Because the District Court has not yet considered ASARCO's motion for intervention on the merits, we do not require intervention; instead, we leave the scope of relief to be determined by the District Court. We also note that since we have not reinstated the preliminary injunction that initially produced ASARCO's alleged injury, administrative remedies may now become available to ASARCO that will render intervention altogether unnecessary. Therefore, we remand to the District Court for consideration of ASARCO's motion to intervene under the remaining requirements of Rule 24(a) of the Federal Rules of Civil Procedure.

III. CONCLUSION

We reverse and remand the District Court's summary judgment against NWF on grounds of standing, because we find that the Federation has shown injury-in-fact more than enough to withstand summary judgment on this issue. Moreover, to find otherwise would contravene the law of the case. The District Court must now address NWF's claims on the merits and fashion whatever relief it deems appropriate. We further find that the District Court's refusal to consider NWF's supplemental affidavits was an abuse of discretion, and direct the court to take into consideration any appropriate further submissions from the parties necessary to a proper resolution. We

decline, however, to reinstate the preliminary injunction because the case should now proceed with dispatch.

We also reverse the trial court's finding that ASARCO's motion to intervene with respect to its Spanish Gulch claims was untimely filed. We remand this issue to the District Court for consideration of the question whether ASARCO is an appropriate intervenor of right given our disposition of the other issues in this case.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS

Nov. 4, 1988

MEMORANDUM OPINION

JOHN H. PRATT, District Judge.

This case, which concerns the status of approximately 180 million acres of public land, was first filed on July 15, 1985, more than three years ago. A brief summary of the ensuing proceedings is appropriate.

On December 4, 1985, this Court granted plaintiff's motion for a preliminary injunction enjoining any new withdrawal revocations and classification terminations, as well as any activities inconsistent with previous withdrawals and terminations. *National Wildlife Federation v. Burford*, 676 F.Supp. 271 (D.D.C.1985). At the same time we denied plaintiff's motion to dismiss. On February 10, 1986, pursuant to the defendants' motion to clarify, the previous injunction of December 4, 1985 was modified to make it clear that it reached only the federal defendants, not the activities of absent third parties, and was not intended "to overturn or in any way to upset fee interests."[1] *National Wildlife Federation v. Burford*, 676 F.Supp. 280, 284 (D.D.C.1986).

On December 11, 1987, the Court of Appeals for this Circuit in a lengthy split opinion (Judge Williams dissenting), affirmed this court's grant of preliminary relief. *National Wildlife Federation v. Burford*, 835 F.2d 305 (D.C.Cir.1987) ("*Burford*"). It first addressed certain preliminary matters such as the challenge to plaintiff's standing, the effect on absent third parties, plaintiff's failure to exhaust its administrative remedies, and laches. *Burford*, 835 F.2d at 310-18. Passing to the merits, the Court held that the plaintiff had met the conventional criteria for the grant of preliminary relief and sustained the injunction. It conceded that it was a "close case" but held that this court did not abuse its discretion in holding that the plaintiff had shown a likelihood of success on the merits. *Id.* at 319, 327.

On April 29, 1988, in a brief slip opinion, the Appellate Court denied defendants' petition for a rehearing. *National Wildlife Federation v. Burford*, 844 F.2d 889 (D.C.Cir.1988) (*per curiam*). It noted the seriousness of the case and its belief that "some of the criticisms of the breadth and scope of the preliminary injunction offered in the vigorous dissent are not without force." *Id.* at 889. Commenting on the far-reaching effect of this court's action in placing the status of vast tracts of land on "hold" and the confusion arising from this unsettled state of affairs, it expressed its belief "that the disposition of these millions of acres should not continue to rest any longer than necessary on the foundation of a preliminary injunc-

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[1] The December 4, 1985 Order was subsequently amended on November 26, 1986, January 6, 1987, and April 11, 1988 to further limit its reach.

tion which was entered *on consideration of the brief affidavits and cursory materials presented to the court below.*" *Id.* (emphasis supplied). We were directed to proceed with this litigation "with dispatch." *Id.* This admonition was repeated by the Court of Appeals as recently as November 1, 1988, when it denied the defendants' emergency motion for a stay pending appeal. *National Wildlife Federation v. Burford,* No. 88-5291, slip op. (D.C.Cir. Nov. 1, 1988) (*per curiam*).

Present Posture

At issue is plaintiff's application for a permanent injunction. Pending before the Court are the motion of the defendants to dismiss and motions for summary judgment submitted by both parties. The matter had been extensively briefed.[2] Argument was held on July 22, 1988, at the conclusion of which the parties were directed to submit additional memoranda on the issue of plaintiff's standing to bring this suit. Transcript of July 22, 1988 at 91-2. All parties have responded.[3]

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[2] Defendants' motion for summary judgment filed September 12, 1986 is 86 pages in length and is accompanied by four declarations of Vincent J. Hecker, Chief, Division of Lands of the Bureau of Land Management (BLM), and the separate declarations of G. William Lamb, District Manager of BLM's Arizona Strip District, Ben Collins, District Manager of BLM's Las Vegas District Office, Ed Hastey, Director of BLM's California State Office, Jack Kelly, Manager of BLM's Lander, Wyoming Resource Area, and David C. Williams, Chief of BLM's Division of Planning and Environmental Coordination (BLM), as well as voluminous exhibits. Plaintiff's motion, as well as its responses to defendants' motion to dismiss and motion for summary judgment together with exhibits, are also extensive.

[3] Plaintiff, in addition to its memorandum filed August 22, 1988 has submitted additional evidentiary material, including declarations from four of its members. These submissions are untimely and in violation of our Order. We decline to consider them. *See* Federal Defendants' Reply to Plaintiff's Statement of Points and Authorities in Support of Its Standing to Proceed, at 1 n. 1.

Standing

In its opinion the Court of Appeals, after applying the "injury in fact" analysis required by Section 702 of the Administrative Procedure Act, concluded that based on the allegations of the complaint, "the Federation has alleged facts sufficient to establish injury in fact to its members." *Burford,* 835 F.2d at 312. In so doing, it pointed out that it had to assume that the allegations of the complaint were true and must be construed in the light most favorable to the organization. *Id.* (citing *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975)). More importantly, the issue of standing arose in the posture of defendant's motion to dismiss, which affected the degree of factual specificity required to be shown in order to establish the likelihood of personal injury to plaintiff's members. This distinction was emphasized in *SCRAP,*[4] where a suit alleging injury to members based on their use and enjoyment of natural resources was held by the Supreme Court sufficient to survive a motion to dismiss. At the same time, the highest Court acknowledged that, on a motion for summary judgment, the plaintiff might have to show injury with greater specificity. *See SCRAP,* 412 U.S. at 689 & n. 15, 93 S.Ct. at 2416 & n. 15. Our Court of Appeals has more recently spelled out the importance of this distinction. *See Wilderness Society v. Griles,* 824 F.2d 4, 16-17 (D.C.Cir.1987) (Plaintiff's failure to show specificity of injury in response to defendant's motion for summary judgment precludes their stand-

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[4] *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973).

ing, but case was reversed to permit plaintiff an opportunity for further discovery on this issue).[5] The Court's affirmance of standing in the instant case must therefore be read in the context of the procedural posture of the case when that Court considered this issue. The dissenting opinion, while observing that "[a]t this point in the proceeding the issue of standing is largely academic" and that "the defendants appear to have conceded the bare minimum necessary for standing," emphasized that the "specificity required for standing allegations to secure a preliminary injunction will normally be no less than that required on a motion for summary judgment." *Burford,* 835 F.2d at 327-28 (Williams, J., concurring and dissenting). This is because plaintiff's burden of showing likelihood of success on the merits presupposes a preliminary finding that plaintiff has standing. *See id.* at 328. In light of the foregoing, we turn now to reconsider our earlier finding that plaintiff has standing to pursue this litigation. Plaintiff predicates its claim of standing on two types of injury, informational or procedural injury to it as an organization and environmental harm to its members, both caused by defendants' administration of the Land Withdrawal Review Program.[6] Plaintiff's Memorandum in Support of Standing at 2.

Admittedly, the decisions on standing are not a model of consistency. However, it is generally agreed that, in order to satisfy the "case or controversy" requirement of the Constitution and Section 702 of the Administrative

[5] The *Wilderness Society* litigation was terminated on October 31, 1988 through the entry of the "Stipulation of All Parties for Dismissal." The issues in that case were held to be mooted by the passage by Congress on August 16, 1988 of Pub.L. No. 100-395.

[6] This program concerns the termination of land classifications and the revocation of land withdrawals.

Procedure Act, the plaintiff must both plead and prove that it or its members have suffered some actual or threatened injury as the result of defendants' allegedly unlawful conduct. These requirements have been summarized by the Supreme Court in *Valley Forge Christian College v. Americans United for the Separation of Church and State,* 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982), as follows:

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99 [99 S.Ct. 1601, 1607, 60 L.Ed.2d 66] (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 38, 41 [96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450] (1976).

It is not disputed that an organization may have standing to bring suit on behalf of its members.[7] Plaintiff's claim of injury to it as an organization rests upon its alleged inability 1) to obtain information as to the federal defendants' Land Withdrawal Review Program and the actions completed under such program, and 2) to participate in the federal defendants' decision making. It claims that it, as an organization, is entitled "to see and use" the kind of information that would have been available had the federal defendants completed environmental impact

[7] To do so, it must meet the three-prong test for representational standing set forth by the Supreme Court. *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). One of these requirements is that one or more of the organization's members has himself standing to sue.

statements. Plaintiff's Statement in Support of Standing at 2-3. In sole support of this position, plaintiff has submitted the declaration of Lynn Greenwall, its Vice President for Resources Conservation. An analysis of the Greenwall declaration shows, after a description of the plaintiff's organization and the nature and size of its membership, the plaintiff's educational program to inform its members concerning conservation issues and their financial support for this purpose, a bare claim that plaintiff's ability to meet the obligations to its members

> has been significantly impaired by the failure of the Bureau of Land Management and the Department of Interior to provide adequate information and public participation with respect to the Land Withdrawal Review Program.

Plaintiff's Statement in Support of Standing at 5.

It is apparent on its face that the Greenwall declaration is conclusory and completely devoid of specific facts. Plaintiff has the burden of proof on this issue and has failed to make a showing as to the existence of the elements essential to its case, *i.e.*, its lack of adequate information and opportunity for public participation. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). It has not done so. Its claim of informational and procedural injury to it as an organization is therefore without merit and provides no basis to support its claim of standing.[8]

[8] Although not required to do so, because defendants did not have the burden to disprove plaintiff's conclusory contention, defendants have advised plaintiff of the environmental documentation and the methodology employed and have made its extensive files containing such information available for plaintiff's inspection. The fact that no individual environmental impact statements were done in individual classification or withdrawal terminations adds nothing to plaintiff's claim of injury.

Plaintiff's other claim of injury concerns alleged environmental harm to its members. Defendants do not challenge the fact that injury to the environment can support a claim of member standing, but rather they focus their attack on the particular showing of injury made in this case. Some useful guidelines have been set forth in *Wilderness Society*, 824 F.2d 4. Both *Wilderness Society* and the instant case concern vast tracts of land[9] and do not involve allegations by a plaintiff that governmental action will be taken against it. Rather, they both concern conduct of a third party whose possible response will injury plaintiff. As was said in *Wilderness Society*:

> The standing question in these three-party cases frequently turns not on the issue of personal injury but rather on so-called causation issues, *i.e.*, whether the third-party's decision is sufficiently dependent upon governmental action that the plaintiff's injury is "fairly traceable" to that action and is "likely to be redressed" by an order binding the government. . . . [citing *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) and other cases] When personal injury *is* at issue in a three-party case, it usually depends upon how likely it is that the third-party's response to the challenged governmental action will injure the plaintiff *at all*.

824 F.2d at 11 (citations omitted).

The Court in *Wilderness Society* concluded its discussion of this problem with the following language which is particularly relevant to the facts of the instant litigation:

[9] *Wilderness Society* involved the selection by the State of Alaska of 100 million acres of federal land and Department of Interior's change of policy to exclude submerged lands from the total acreage to be conveyed to Alaska. *See Wilderness Society*, 824 F.2d at 7.

> To sum up, whether an allegation of threatened injury suffices for standing turns on the likelihood of the occurrence of that injury. . . . [T]he court must ascertain whether the third party's response to governmental action will . . . affect the plaintiff's intended behavior. Where the alleged injury involves access to land in a three party case, as in *Sierra Club* [*v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)], *SCRAP*, and the case at bar, the judgment regarding the likelihood of injury turns on *whether the plaintiff's future conduct will occur in the same location as the third party's response to the challenged governmental action*. Otherwise, the threat of injury would be too amorphous or uncertain; it would be no greater for the plaintiff than for any person simply opposed to the governmental action in question. In short, the issue in each case is whether the plaintiff has put forward enough facts to show that his intended behavior will be injured as a direct or indirect result of the challenged governmental action.

Wilderness Society, 824 F.2d at 12 (emphasis supplied).

Plaintiff rests its entire claim of standing to sue for environmental injury on the affidavits of two persons; *i.e.*, Peggy Peterson and Richard Erman. Both of their brief affidavits were filed on May 22, 1986.[10] Neither appears to be referred to in plaintiff's Motion for Summary Judgment filed on June 23, 1986, which does not consider the question of plaintiff's standing.

The Peterson affidavit claims that she uses federal lands *in the vicinity* of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment and that her recreational and aesthetic enjoyment

[10] They are 3 and 3-½ pages in length, respectively, and use the same boiler plate language and format.

has been and continues to be adversely affected as the result of the decision of BLM to open it to the staking of mining claims and oil and gas leasing. Peterson Affidavit, filed May 22, 1986. This decision[11] opened up to mining approximately 4500 acres within a two million acre area, the balance of which, with the exception of 2000 acres, has always been open to mineral leasing and mining. *See* Kelly Affidavit attached to Federal Defendant's Motion for Summary Judgment filed September 4, 1986.[12] There is no showing that Peterson's recreational use and enjoyment extends to the particular 4500 acres covered by the decision to terminate classification to the remainder of the two million acres affected by the termination. All she claims is that she uses lands "in the vicinity." The affidavit on its face contains only a bare allegation of injury, and fails to show specific facts supporting the affiant's allegation.

The Erman Affidavit is similarly flawed. Erman asserts that he uses federal lands, including those in the vicinity of the Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest for recreational purposes and for aesthetic enjoyment. He further asserts that his recreational use and aesthetic enjoyment of federal lands, particularly those *in the vicinity* of the Grand Canyon National Park and the Arizona Strip have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department, with particular reference to the opening to the staking of

[11] Termination of Classification No. W-6228 referred to in Federal Defendants' Motion for Summary Judgment, Statement of Facts at 6.

[12] The Kelly Affidavit sets forth in great detail the voluminous process started in 1977 and concluded in 1984 that the BLM office in Lander, Wyoming followed in reaching its decision to terminate Classification No. W-6228. It completely answers plaintiff's claims of inadequate land use plans, lack of conformance determinations and insufficient opportunities for public participation.

mining claims and the failure of the Bureau and the Department to provide notice of their proposals to terminate classifications and other withdrawals and to provide opportunities for public involvement. Erman Affidavit filed May 22, 1986. The magnitude of Erman's claimed injury stretches the imagination. As the affidavit of J. William Lamb shows, the Arizona Strip consists of all lands in Arizona north and west of the Colorado River on approximately 5.5 million acres, an area one-eighth the size of the State of Arizona. Furthermore, virtually the entire Strip is and for many years has been open to uranium and other metalliferous mining. The revocation of withdrawal concerned only non-metalliferous mining in the western one-third of the Arizona Strip, an area possessing no potential for non-metalliferous mining. *See* Lamb Affidavit, attached to Federal Defendant's Motion for Judgment.[13]

Both the Peterson and Erman Affidavits are vague, conclusory and lack factual specificity. They do not and cannot show "injury in fact" with respect to the two specific areas in Wyoming and Arizona in the vicinity of which these affiants claim to be located. More important, standing alone, these two affidavits do not provide any basis for standing to challenge, as violative of the Federal Land Policy Management Act, the legality of each of the 1250 or so individual classification terminations and withdrawal revocations. It should be noted that plaintiff's claims of injury reach hundreds of decisions affecting 180 million acres spread over seventeen states. Since plaintiff lacks standing in the constitutional sense or as an "aggrieved

[13] The Lamb Affidavit also details the history of the several withdrawals and classifications placed on the public lands comprising the Arizona Strip. These commenced in 1930 and were terminated in 1981 after the passage of the Federal Land Policy and Management Act, 43 U.S.C. § 1701, *et seq.*

party" under Section 702 of the APA, we lack subject matter jurisdiction and dismiss for lack of standing.

Merits

In view of the position taken that this Court lacks jurisdiction for lack of standing, it is not necessary that we reach the merits of plantiff's claim for injunctive relief. The dissenting opinion of the Court of Appeals has mirrowed many of these problems in its discussion of our grant of preliminary injunction presented as it was in response to defendant's motion to dismiss.

An Order consistent with the foregoing has been entered this day.

ORDER

Upon consideration of the parties' respective motions for summary judgment and oppositions thereto, the hearing thereon held July 22, 1988, and the parties' subsequent submissions on the issue of plaintiff's standing, it is by the Court this 4th day of November, 1988

ORDERED that this Court's grant of a preliminary injunction be vacated, and it is

ORDERED that Defendants' Motion for Summary Judgment be granted; and it is

FURTHER ORDERED that the above action shall stand dismissed the lack of standing.

APPENDIX C

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 86-5239, 86-5240

NATIONAL WILDLIFE FEDERATION

v.

ROBERT F. BURFORD, ET AL., APPELLANTS

MOUNTAIN STATES LEGAL FOUNDATION, ET AL.
(TWO CASES)

Decided Dec. 11, 1987
As Amended Dec. 15, 1987

Before MIKVA and WILLIAMS, Circuit Judges, and WEIGEL,* Senior District Judge.

Opinion for the Court filed by Circuit Judge MIKVA.

Opinion concurring in part and dissenting in part filed by Circuit Judge WILLIAMS.

MIKVA, Circuit Judge:

The National Wildlife Federation (the Federation), a private organization dedicated to conserving the nation's

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* Of the United States District Court for the Northern District of California, sitting by designation pursuant to 28 U.S.C. § 294(d).

natural resources, brought suit against the Director of the Bureau of Land Management, the Secretary of the Interior, and the Department of the Interior (collectively, the Department), challenging the Department's conduct of its "Land Withdrawal Review Program" (the Program). Pursuant to the Program, the Department lifted protective restrictions pertaining to almost 180 million acres of federal land located in seventeen states. This land is subject to the requirements of the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 *et seq.* (1982) (FLPMA or the Act), which establishes comprehensive rules for the management and preservation of federal lands and provides for protection of land in the public domain from private ownership and development.

The Federation alleged, *inter alia,* that in lifting protective restrictions under the Program, the Department improperly ignored statutory provisions which subject release of land from the public reserve to careful procedural protections. The district court issued a preliminary injunction, enjoining the Department from modifying, terminating, or revoking any restriction in effect on January 1, 1981, and enjoining the agency from taking any action inconsistent with such restrictions. Appellants, the Department and Mountain States Legal Foundation (Mountain States), a nonprofit group which represents public land user groups, contest the injunction on several grounds. They principally contend that the Federation lacks standing to challenge the Department's actions, that the injunction impermissibly restricts the rights of absent third parties, and that the Federation is not entitled to the injunction under traditional equity principles. We reject each of appellants' arguments and affirm the district court's issuance of the preliminary injunction.

I. BACKGROUND

A. *The Applicable Law*

This action concerns the Department's authority to establish and implement land use planning for millions of acres of federal public lands. This authority precedes the enactment of FLPMA. Up until the mid-20th century, management of the nation's public lands consisted basically of a policy of disposal. Under this policy, the government transferred vast acreage of land from federal ownership to private citizens, states, countries, cities, and companies, for purposes such as homesteading and railroad construction. Beginning in the 1930's, however, the federal government began reorienting its policy away from disposal and toward retention and management. The two relevant mechanisms for implementation of this new policy were classifications and withdrawals. "Classifications" designate public lands for retention and frequently segregate the lands from the operation of various land disposal laws. "Withdrawals" directly remove designated lands from disposal under the general land laws.

Classifications for federal lands were made, for the most part, pursuant to the Classification and Multiple Use Act of 1964 (the C & MU Act), 43 U.S.C. §§ 1411-15, now expired. The C & MU Act directed the Secretary of the Interior to develop criteria to be used in determining which of the public lands administered by the Department should be retained in federal ownership and which lands were suitable for disposal. Most classifications for retention segregated lands from sale and from disposal under the agricultural laws (*e.g.*, homestead, desert land entry, and Indian allotment laws). Some classifications further segregated land from exchange, from location under federal mining laws, or from mineral leasing. Many of the lands were classified for multiple use management. Over

the years, pursuant to the C & MU Act, the Department classified almost 180 million acres of publicly managed lands for retention by the federal government.

The first withdrawals were placed on public lands by President Franklin Roosevelt under the Pickett Act, which authorized the President to temporarily withdraw from settlement, location, sale or entry any of the public lands in the United States and to reserve the lands for any public purpose. *See* 43 U.S.C. §§ 141-143, repealed. A withdrawal withholds land from operation of one or more of the general land and mineral disposal laws, including the 1872 Mining Law, as amended, 30 U.S.C. §§ 22, *et seq.* the Mineral Leasing Act, 30 U.S.C. §§ 181-226-2, and the Geothermal Steam Act, 30 U.S.C. §§ 1001-1025. The purpose of withdrawals is to limit activities under those laws and to preserve other public values, such as recreation and fish and wildlife. At the time this suit was filed, about 68 million acres of land had been withdrawn pursuant to constitutional and statutory authority.

The creation, modification, and revocation of classifications and withdrawals is now controlled by FLPMA. Enacted in 1976, FLPMA provides the Bureau of Land Management (BLM or the Bureau), the subagency of the Department charged with land management responsibilities, with permanent, comprehensive guidelines for carrying out its mandate. The Act requires land use planning for public lands under BLM's jurisdiction and outlines procedures for the development, maintenance, and revision of land use plans. *See* 43 U.S.C. §§ 1701(a)(2), 1712.

The Act also establishes management criteria. FLPMA states that the federal policy under the Act is that "public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel

will serve the national interest." *Id.* § 1701(a)(1). The Act stipulates additional policy guidelines for BLM's land use planning. First, Congress directed that "management be on the basis of multiple use and sustained yield unless otherwise specified by law." *Id.* § 1701(a)(7). Second,

> the public lands [must] be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

Id. § 1701(a)(8). Finally, the Act directs BLM to manage the lands in a manner which recognizes the country's need for natural resources. *Id.* § 1701(a)(12).

FLPMA contains specific provisions governing the disposition of classifications and withdrawals in effect when Congress enacted FLPMA. The savings provision of the Act states that "[a]ll withdrawals, reservations, classifications, and designations in effect as of the date of the approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law." Pub.L. No. 94-579, 90 Stat. 2743. The Act directs BLM to review all existing classifications and to review the existing withdrawals regarding public lands in the eleven contiguous Western states by 1991. *See* 43 U.S.C. §§ 1701(a)(3), 1714(*l*). Section 202 of the Act requires BLM, subject to this review, to develop land use plans for all public lands "regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses." *Id.* § 1712(a). FLPMA further provides that the Department may modify

or terminate any existing classification in a manner consistent with the land use plan developed under FLPMA. *See id.* § 1712(d). Similarly, the Act authorizes the Department to revoke withdrawals, but only in accordance with the Act. *See id.* § 1714(a).

The Department has implemented FLPMA's comprehensive land use planning requirements by regulations. These Departmental regulations specifically define the land use plans required by FLMPA as Resource Management Plans (Plans). *See* 43 C.F.R. § 1601.0-5(k) (1986).

B. *Implementation of the Land Withdrawal Review Program*

Until 1981, the agency took little action to review existing classifications and withdrawals. In 1981, however, the Department proceeded to review of classifications and withdrawals with full force. Although classifications and withdrawals are technically subject to the review provisions of different sections of FLPMA, BLM determined that classifications would be systematically reviewed as part of the Bureau's Land Withdrawal Review Program. *See* BLM Organic Act Directive No. 81-11 (June 18, 1981), Joint Appendix (J.A.) at 97-A.

The Bureau's stated objective was to cancel a large portion of the classifications created under the C & MU Act. The Bureau ordered the elimination, in total, of all C & MU classifications that met four stipulated criteria. BLM retained discretion to maintain the few C & MU classifications not meeting the criteria pending review of the existing land use plan or completion of the Plan pursuant to FLPMA. *See id.*, J.A. at 97-B. The agency directed priority attention be paid to termination of classifications that segregate lands from mining and/or mineral leasing. Pursuant to these directives, the Department has reviewed classifications covering 167.7 million acres of public land

and has terminated classifications for approximately 160.8 million acres. As a result, substantial public land areas have been opened to many previously restricted activities and uses.

The Department directed those reviewing existing withdrawals to determine whether the original purpose of the withdrawal was still being served and if not, to revoke the restriction. Pursuant to its review process, the Department has revoked withdrawals covering approximately 20 million acres of public lands. The effect of the revocations is that the previously withdrawn lands are open to the operation of all or part of the public land laws, provided the lands remain in federal ownership and are not subject to some other action that would prevent the application of the public land laws.

C. *Proceedings in This Case*

The Federation commenced this action on July 15, 1985, alleging that the agency's revocations of protective withdrawals and termination of protective classifications pursuant to the ongoing Program violated various specific provisions of FLPMA, the National Environmental Policy Act of 1969, 42 U.S.C. §§4321, *et seq.* (NEPA), and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (APA). Three of the eight counts of the Federation's amended complaint are relevant to this appeal. First, in Count I, the Federation claimed that the Department had violated its duties under FLPMA by failing to prepare Plans in connection with its withdrawal revocations and classification terminations. Second, in Count II, the Federation claimed that the Department had violated FLPMA by revoking withdrawals and terminating classifications in eleven Western states without prior submission of a recommendation to the President or the Con-

gress. Third, in Count VII, the Federation charged that the Department had violated FLPMA by failing to provide any opportunity for public involvement in the Department's land status decisions. In its prayer for relief, the Federation sought, *inter alia*, a declaration that the Department's Program violates applicable law and an order both reinstating all withdrawals, classifications, or other designations in effect on January 1, 1981 and enjoining the Department from taking any action inconsistent with such designations until the Department complied with its statutory obligations.

Simultaneous with the filing of its complaint, the Federation moved for a preliminary injunction, seeking to halt any new revocations or terminations and to enjoin any activities inconsistent with the previous withdrawals and classifications. The Federation did not seek to invalidate existing claims nor did it seek to overturn completed sales or exchanges. The Department opposed the motion, arguing mainly that the Federation had not established the prerequisites for injunctive relief. The agency then moved to dismiss the entire action for failure to join the holders of mining claims and mineral leases as indispensable parties. The Department also moved to dismiss Count II of the complaint for lack of standing. Shortly thereafter, the district court granted Mountain States' motion to intervene. John Seiberling, Chairman of the House Committee on Public Lands, subsequently moved to intervene for the limited purpose of challenging the Department's failure to submit recommendations for withdrawal revocations to the Congress.

In a memorandum opinion, the district court resolved the three pending motions. *See National Wildlife Federation v. Burford,* 676 F.Supp. 271 (D.D.C.Dec.1985). First, the court granted Representative Seiberling's motion to intervene as a plaintiff in the case, rejecting the Depart-

ment's contention that the Congressman did not have standing to pursue his claim. Second, the court denied the Department's motion to dismiss. The court ruled that although the holders of mining claims and mineral leases were necessary parties, they were not indispensable parties under Federal Rules of Civil Procedure 19; therefore, the court's lack of personal jurisdiction over these absent third parties did not necessitate dismissal of the complaint. The court further noted that under the "public rights" doctrine, first articulated in *National Licorice Co. v. NLRB*, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799 (1940), joinder was not required. The court also held that the issue of the Foundation's standing to pursue Count II of its complaint had been rendered moot by Representative Sieberling's [*sic*] intervention on an identical claim.

Finally, the district court granted the Federation's motion for a preliminary injunction. The court found that the Federation had shown substantial likelihood of success on Counts I and VII of its complaint. In addition, the court found that, unless enjoined, the Department's actions in lifting protective land restrictions would irreparably injure the Federation's members. Further, the court concluded that the harm to third parties was not so serious as to outweigh the other factors supporting injunction. The court further found that the public interest clearly favored granting the injunction. The court therefore issued a preliminary injunction enjoining the federal defendants as well as persons holding interests in land from taking any further action inconsistent with pre-1981 classifications and withdrawals.

The Department moved for amendment, reconsideration, and clarification of the preliminary injunction. Mountain States also moved for reconsideration of the injunction. In addition, Mountain States asked that the court reconsider its denial for nonjoinder. The Department introduced no new arguments, but Mountain States raised two claims for the first time. Mountain States argued that the Federation lacked standing in that it could prove no injury in fact because the lands at issue were subject to commercial exploitation even before the terminations and revocations under the Program. Mountain States also asserted that the Federation had failed to exhaust its administrative remedies with regard to classification terminations. The district court rejected both arguments and denied the motions to reconsider. The court also declined Mountain States' request to certify the joinder question for appeal under 28 U.S.C. § 1292(b). With regard to the defendants' request to clarify the preliminary injunction, the court modified the order to remove the prohibition on the activities of absent third parties. The injunction thus only directly enjoins the federal defendants. The modification also made clear that post-1981 terminations and revocations were "suspended," not voided. *See National Wildlife Federation v. Burford*, 676 F.Supp. 280 (D.D.C.1986). This appeal followed. The district court has denied defendants' motion for a stay of the preliminary injunction pending appeal.

Mountain States also seeks relief on the issue of nonjoinder by way of a separate Petition for a Writ of Prohibition. *See In re: Mountain States Legal Foundation*, No. 86-5353. We deny that relief in a separate order of even date.

II. PRELIMINARY ISSUES

Before examining whether the Federation was entitled to a preliminary injunction on its two FLPMA claims under conventional standards of equity, we pause to address several preliminary issues raised by appellants. First, we consider appellants' challenge to the Federation's stand-

ing. Second, we inquire whether the injunction impermissibly impinges on the rights of absent third parties over whom the district court has no personal jurisdiction. We then examine appellants' claims that the Federation is guilty of laches and that if failed to exhaust administrative remedies.

A. ***Standing***

It is well settled that an organization may have standing to bring suit on behalf of its members. *See International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock (UAW)*, 477 U.S. 274, 106 S.Ct. 2523, 2529, 91 L.Ed.2d 228 (1986). In *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977), the Supreme Court set out the following three-part test for representational standing: (1) one or more of the organization's members would otherwise have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purposes; and (3) an individual member's participation in the lawsuit is not required. The Department and Mountain States both contest the Federation's ability to meet the first part of the *Hunt* test. Appellants assert that the Federation's individual members would not have standing in their own right, in particular because the Federation has not alleged the requisite injury in fact.

In order to mount its claim against the Department under § 702 of the APA, the Federation must demonstrate that "the challenged action ha[s] caused [its members] injury in fact." *Sierra Club v. Morton*, 405 U.S. 727, 733, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972). The injury-in-fact analysis under section 702 mirrors the one required by the Constitution. *See Community for Creative Non-*

Violence v. *Pierce*, 814 F.2d 663, 667 (D.C.Cir.1987). The Federation must allege facts demonstrating a definable and discernible injury to its members and an adequate connection between that injury and the members. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973). The personal injury may be "actual or threatened." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982).

In a pair of environmental lawsuits relevant to this case, the Supreme Court elaborated the injury in fact requirement. In *Sierra Club*, an environmental organization alleged that it had standing to challenge the government's decision to permit development of a quasi-wilderness national park. The injury alleged by Sierra Club was that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." *Sierra Club*, 405 U.S. at 734, 92 S.Ct. at 1366. The Court acknowledged that this was a cognizable injury, but held that it did not amount to "injury in fact" sufficient to afford standing. The Court found that the Sierra Club had not shown injury in fact because it had "failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development." *Id.* at 735, 92 S.Ct. at 1366. In challenging an ICC rate increase, the plaintiff-organization in *SCRAP* tailored its allegations to conform to the Court's teachings in *Sierra Club*. In *SCRAP*, the Court found that the plaintiffs had established standing and distinguished themselves from *Sierra Club* by alleging that their members used "the forest, streams, mountains and other resources surrounding the Washington Metro-

politan area" for various recreational and aesthetic purposes and that these uses would be disturbed by a chain of third-party responses to the challenged agency action. *SCRAP*, 412 U.S. at 678, 93 S.Ct. at 2411; *see id.* at 685, 93 S.Ct. at 2415. The Court thus made clear that in order to establish injury in fact for representational standing, an organization must allege facts showing that one or more of its members is among the persons injured by the challenged agency action.

In analyzing whether the Federation has shown sufficient injury in fact under these principles, it is important to keep in mind that the standing issue arose before the district court on the Department's motion to dismiss the Federation's complaint. This posture has two important ramifications. First, we review the allegations of the Federation's complaint. In so doing, we must accept as true all material allegations and construe the complaint in favor of the Federation. *See Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975). Second, and more important, the posture affects the degree of specificity of facts which the Federation must show to establish a sufficient likelihood of personal injury to its members. *See The Wilderness Society v. Griles*, 824 F.2d 4, 16 (D.C.Cir.1987). In *SCRAP*, for example, the Court found that the plaintiff-organization's alleged injury, based only on its members' use and enjoyment of natural resources *surrounding* the Washington Metropolitan area, was enough to survive a motion to dismiss. The Court acknowledged, however, that on a motion for summary judgment, plaintiff might have to show injury with greater specificity, for example, by naming a specific forest that was used and would be affected by the challenged agency action. *See SCRAP*, 412 U.S. at 689 n. 15, 93 S.Ct. at 2417 n. 15. *See also Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 45 n. 25, 96 S.Ct. 1917,

1927 n. 25, 48 L.Ed.2d 450 (1976). Mountain States argues that the Federation's standing should not be viewed from this more generous perspective because there is a preliminary injunction at issue. This argument is flawed. In *SCRAP* itself, the standing issue can before the trial court in exactly the same way as in this case—on motions to dismiss and for a preliminary injunction. The Court made clear that the defendants could not complain that the allegations in the plaintiff's complaint were not specific enough. *See SCRAP*, 412 U.S. at 689 nn. 14 & 15, 93 S.Ct. at 2417 nn. 14 & 15.

The Federation's amended complaint reads as follows:

> NWF and its members are suffering and will continue to suffer injury in fact as a result of the challenged actions. Members of the NWF use and enjoy the environmental resources that will be adversely affected by the challenged actions. They regularly use these resources for fishing, hunting, bird and wildlife watching, canoeing and boating, hiking, camping, and other similar activities. These persons' use and enjoyment of these resources will be irreparably injured if the defendants are permitted to terminate protective land use restrictions and thereby open up public lands to exploration, development, and disposal, without the development of land use plans, without prior preparation of adequate environmental impact statements, and without compliance with applicable laws, regulations, and procedures. Among other things, the challenged actions will adversely affect plaintiff and its members by destroying fish and wildlife habitat, and by impairing natural beauty.

The Federation appended to the complaint a list of 788 land status actions, including termination of land classifications and land withdrawals, taken by the Depart-

ment pursuant to the challenged Program. The organization noted that this list was not intended to be inclusive.

Assuming the allegations of the complaint are true and construing them in the light more favorable to the organization, as we must in this posture of the case, we conclude that the Federation has alleged facts sufficient to establish injury in fact to its members. As an initial point, there is no question that harm to one's recreational, aesthetic, and environmental interests can amount to injury in fact for standing purposes. *See Sierra Club*, 405 U.S. at 734, 92 S.Ct. at 1366. The important question for our standing analysis therefore is whether the Federation's members are themselves among the injured. *See id.* at 734-35, 92 S.Ct. at 1366; *Wilderness Society*, 824 F.2d at 15. The Federation has clearly made this showing. It alleges that its 4.5 million members and supporters across the country use and wish to continue to use previously withdrawn or classified lands for recreational or aesthetic purposes, and that these persons are injured in fact when withdrawals are revoked and classifications terminated, thereby threatening continued use of the property and its resources for such purposes. The Federation asserts particularized, discrete injuries to its members as persons who regularly use areas affected by the Program for specific activities and pastimes. The Department is thus mistaken in asserting that the Federation's allegations amount to no more than a "mere interest in a problem," found to be insufficient to constitute injury in fact in *Sierra Club*. *See Sierra Club*, 405 U.S. at 739-40, 92 S.Ct. at 1368. This case is a far cry from *Sierra Club*; the Federation's allegations fit squarely within *SCRAP*, a case which appellants fail to mention.

Given the holding of *SCRAP*, it is difficult to pinpoint appellants' objections to the Federation's allegations of injury. At times, they appear to claim that the organization's

showing fails because it has not identified any specific member who uses a particular parcel of land covered by the challenged agency action. It is unclear where appellants locate this purported requirement. No such specificity was required in *SCRAP*; the plaintiff-organization simply alleged in general terms that its five members used the natural resources surrounding a specified area allegedly affected by the challenged government action. The Federation has done the same, except that rather than identifying the affected land by geographic location or by name, it has referred to the specific land status actions taken by the Department pursuant to the Program, all of which affect specific situses identified by *Federal Register* publications. There is no difficulty discerning the land to which the Federation refers; it is the approximately 180 million acres subject to the Program's terminations and revocations.

Even if this lack of specificity were somehow fatal to the complaint, it was cured by the affidavits of two Federation members filed with the district court after issuance of the preliminary injunction. Appellants argue that the Federation's "post hoc" filings cannot excuse the district court's exercise of jurisdiction. We are not seeking such an excuse; we are inquiring whether the Federation has standing to pursue its action. From our perspective on appeal, we may properly turn to the affidavits which supply evidence in support of the Federation's allegations of injury. Both members stated that they used federal lands, including those in the vicinity of areas covered by withdrawal revocations (specifically, the South Pass-Green Mountain area of Wyoming, the Grand Canyon, the Arizona Strip, and Kaibab National Forest) for recreational uses and for aesthetic enjoyment. Both members claimed that their use and enjoyment of these land "have been and continue to be adversely affected in fact by the unlawful actions of the

Bureau and the Department." These affidavits provide a concrete indication that the Federation's members use specific lands covered by the agency's Program and will be adversely affected by the agency's action. Mountain States contends that even these affidavits are insufficent because the named members claim only to use resources in the "vicinity" of the land covered by the challenged withdrawal revocations. The Federation's allegations in this regard however comport with those in *SCRAP*; they therefore are sufficiently specific for purposes of a motion to dismiss.

In a similar vein, the Department protests that the Federation has not shown "concrete," "discernible" injury because the harm alleged is merely hypothetical. At bottom, appellant challenges the Federation's reliance on allegations of threatened injury that allegedly will occur in the future as a result of third parties' responses to the Department's actions. We recently described the sufficiency of allegations of threatened injury as turning on "the likelihood of the occurrence of that injury." *Wilderness Society*, 824 F.2d at 12. *Wilderness Society*, like this case, involved alleged injury to the plaintiffs' use of land (and its resources) that stemmed from the expected response of third parties to the agency action rather than directly from the agency action itself. We observed that, in such cases, "the judgment regarding likelihood of injury turns on whether the plaintiff's future conduct will occur in the same location as the third party's response to the challenged governmental action." *Id.* at 12; *see also id.* at 15. We concluded that plaintiffs must be able to allege a specific site of injury—"lands that they intended to use that has been affected by [the government's action]." *See id.* at 15. In this regard, the Federation's allegations of injury suffice; because the Program acts directly on the *land* (rather than on third parties), we can be certain that the

challenged agency action has affected the land areas that the Federation's members use and that the anticipated response by third parties will concern those lands. *Cf. SCRAP*, 412 U.S. at 688-89, 93 S.Ct. at 2416 (holding that more attenuated line of causation and more speculative eventual injury sufficed to survive a motion to dismiss). The members' affidavits make this clear. For example, in his affidavit, one member alleges that the Arizona Strip had been opened to the staking of mining claims, "an action which threatens the aesthetic beauty and wildlife habitat potential of these lands." In addition, the Department explained at oral argument that the Grand Canyon had been opened to nonmetalliferous mining and that the Green Mountain-South Pass areas of Wyoming, originally segregated to protect small streams and adjacent riparian areas and to serve outdoor recreation purposes, has been opened to all forms of mining.

Appellants raise two additional objections that are equally unavailing. First, appellants suggests [*sic*] that the Federation must show that *each* of its members has standing. This assertion is clearly incorrect. In order to establish representational standing, the Federation need only demonstrate that "one or more" of its members would have standing to challenge the Department's actions. *UAW*, 106 S.Ct. at 2529; *see Warth*, 422 U.S. at 511, 95 S.Ct. at 2211. Second, appellants apparently argue that the Federation only has standing to seek relief pertaining to those specific tracts as to which it can demonstrate a concrete interest; that is, appellants appear to contend that the Federation must adduce facts sufficient to establish standing for one (or more) of its members with respect to each specific tract of land at issue. This assertion is not only unsupported by the caselaw, but is also illogical. The Federation is essentially challenging an alleged pattern of agency action embodied in the Department's conduct of its

Program. If the organization can establish that the Department's actions as to one parcel of land are unlawful because the procedure by which the agency terminates classifications and reyokes withdrawals fails to comply with FLPMA, then it has established the illegality as to all the lands at issue which have been affected by the unlawful procedure. In such a situation, the Federation need not demonstrate that it is injured by each and every agency action which flows from the implementation of the unlawful Program. *See, e.g., Sierra Club v. Adams*, 578 F.2d 389, 391-93 (D.C.Cir.1978). Concrete particularized injury to any one of its members with regard to any covered land is sufficient.

In sum, we conclude that the Federation has alleged facts that demonstrate that the actions of the Department threaten to harm the cognizable interests of the Federation's members. Consequently, we find that the Federation has alleged injury in fact sufficient to establish standing to pursue its two FLPMA claims against the Department.

In addition to challenging the Federation's standing to prosecute Counts I and VII of its complaint, the Department challenges the district court's holding that Representative Seiberling has standing to pursue his independent claim, which mirrors Count II of Federation's complaint (challenging the Department's failure to seek Presidential or Congressional review of the proposed land status actions). Indeed, the Department goes so far as to suggest that the issue of whether a congressman has standing to protect his right to participate in the legislative process may be appropriate for *en banc* consideration by this court. We decline to reach this issue. The Federation's claims in Count II of its complaint are not relevant to the district court's issuance of the preliminary injunction, which is the issue before us on appeal. The district court grounded its injunction order on the Federation's likeli-

hood of success on the merits of its other two separate FLPMA claims, Counts I and VII of its complaint. Accordingly, the issues of congressional standing in general, and Representative Seiberling's standing in particular, are not before us.

B. ***Absent Third Parties***

Appellants devote a large portion of their energies to arguing that the injunction impermissibly affects the rights and interests of absent third parties over whom the district court has no personal jurisdiction. Appellants couch their argument in both jurisdictional and due process terms. They contend that the district court lacked jurisdiction to issue a preliminary injunction allegedly affecting the interest of these nonparties. They also contend that the injunction offends principles of due process because it deprives third parties of their property rights without notice and an opportunity to be heard.

Appellants' jurisdictional argument is unsound. The district court has not exercised jurisdiction over any party beyond its lawful reach. The injunction does not compel any absent party to take any action, nor does it prohibit any absent party from acting in any way. As the district court held, "the preliminary injunction enjoins only federal defendants. Third parties are not subject to its prohibitions." Fed. 10th Order at 10. The district court clearly has subject matter jurisdiction to review executive actions for their compliance with a statutory mandate, *see* 28 U.S.C. §§ 1331, 1346, and it has personal juridiction over the federal defendants.

While acknowledging that the district court modified its order so that nonparties are not expressly enjoined, appellants argue that the practical effect of the injunction is the same on these nonparties. They argue that in enjoining

the Department's approval of nonparties' applications for land development interests, the court has in effect enjoined the nonparties from exercising their property rights. We do not agree. The order does not deprive any person or entity who is not before the court of his property rights. The injunction does not invalidate existing mining claims or mineral leases. Indeed, the order explicitly allows holders of existing mining claims to continue to satisfy the legal requirements to preserve those claims. Mountain States complains that such claims and leases may be void *ab initio* if they were initiated before the land was lawfully available for entry. However, the injunction simply *suspends* the classification and withdrawal terminations under the Program; it does not reinstate the original withdrawals and classifications. Thus, the court's order does not upset these interests. Nor does it overturn completed sales or exchanges of previously withdrawn lands. The injunction addresses only the Department's ability to convey legal title to private persons in the future. If title has already vested in third parties, their right to use and enjoyment of that property is not affected by the court's order. Similarly, the injunction does not affect the contractual rights of third parties; these parties remain fully able to make any claim arising under their contracts. The preliminary injunction merely preserves the *status quo* by preventing the staking of new mining claims, the issuance of additional mining leases, and the loss of additional public lands to private interests via sale or exchange.

The injunction's only actual effect on third parties is lost or delayed opportunity to consummate transactions for the purchase or use of federal lands in the future. These interests, however, are not constitutionally protected property rights. The absent third parties to whom appellants refer stand in various stages in the process of perfecting their interests in the lands at issue. Some parties have

staked initial claims, or taken other preliminary steps, but require BLM to take further action before they can complete their development projects. The injunction prohibits the BLM from acting to further these projects during the pendency of this litigation (presuming such action would conflict with the original classification or withdrawal). Thus, some third parties are delayed in obtaining certain interests—*e.g.*, receiving approval to drill oil and gas wells on leases issued prior to the injunction, perfecting final entries, obtaining patents under the land laws—as a result of the injunction. But these absent parties have no contractual or legal right to additional BLM permit or approvals. *See, e.g., Lewis v. Hickel*, 427 F.2d 673, 676-77 (9th Cir.1970), *cert. denied*, 400 U.S. 992, 91 S.Ct. 456, 27 L.Ed. 2d 440 (1971); *Angelina Holly Corp. v. Clark*, 587 F.Supp. 1152, 1156 (D.D.C. 1984). They hold no more than an expectancy, the loss of which does not constitute a deprivation of property within the meaning of the due process clause of the Constitution. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980); *National Consumer Information Center v. Gallegos*, 549 F.2d 822, 828 (D.C.Cir.1977). Their absence from the lawsuit does not preclude the district court from issuing the preliminary injunction. *Compare Ohio ex rel. Brown v. Callaway*, 497 F.2d 1235, 1241 (6th Cir.1974) (holding that contract with construction company rendered inequitable a preliminary injunction restraining the contractors from performing the contractual obligations).

C. *Exhaustion*

Mountain States asserts that the Federation failed to exhaust its administrative remedies with regard to land classification terminations. FLPMA itself imposes no ex-

haustion requirement in this context, so Mountain States must look to Departmental regulations. Appellant argues that the Federation could have and should have raised its land use planning and public participation claims through administrative appeals of individual land classification terminations to the Interior Board of Land Appeals (the IBLA). The district court specifically found that the administrative avenues of review touted by Mountain States were not open to the Federation. We agree.

According to the Mountain States, the Federation had recourse to the agency's general procedures for appeals on public land issues. The Department's regulations provide, in relevant part, that

> (a) Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative law judge shall have a right to appeal to the [IBLA].

43 C.F.R. § 4.410(a) (1986). Mountain States argues that the district court erred in holding that because the regulations refer only to a "party to a case" as having the right to appeal, the Federation had no access to appellate review. Appellant apparently concedes that the Federation cannot be considered a "party" to any discrete classification termination conducted pursuant to the Program. It asserts, however, that the IBLA construed the rule liberally to vest the right of appeals in "anyone adversely affected" by any Department decision. In support of this proposition, Mountain States cites two cases, *Desert Survivors*, 80 IBLA 111 (1984), and *Park County Resource Council v. Department of Agriculture*, 613 F.Supp. 1182 (D.Wyo.1985), *aff'd*, 817 F.2d 609 (10th Cir.1987).

Neither case relied upon by Mountain States provides authority for an organization that is not a party to the underlying proceeding to appeal from a discrete classification termination decision. In *Desert Survivors*, an environmental organization which had actively and extensively participated in the formulation of the land use plans for the lands in question protested approval of a mining plan and then appealed the denial of that protest to the IBLA; unlike the Federation, the organization was a "party to [the] case." The status of the appellant in *Park County Research Council* is less clear. It appears, however, that the organization was involved in an on-going interchange with BLM concerning the issuance of a drilling permit, and when BLM granted the permit, the organization appealed the decision to the IBLA. *See* 613 F.Supp. at 1184-85. It would appear, therefore, that the organization was also a party to the case as to that issue. Moreover, with regard to the organization's challenge to BLM's decision not to draft an EIS before pursuing its proposed action, the Tenth Circuit reversed the district court's holding that the plaintiff had failed to exhaust its administrative remedies by not appealing to the IBLA. The court specifically found that "[n]either the IBLA nor any other administrative forum was available to plaintiffs at the time of suit." 817 F.2d at 619. Thus, there is no indication in either case that the IBLA interprets its regulation to permit *anyone* adversely affected by a Department decision to appeal. In the absence of such a clear agency interpretation, we are constrained to find that the rule means what it says: only a "party" to a proceeding that culminates in a classification termination decision may appeal that decision to the IBLA. We thus conclude that the Federation had no right to appeal any of the challenged classification terminations pursuant to this regulation. Consequently, the organization cannot be charged with failure to exhaust administrative remedies.

Even if petitioners could have appealed to the Board under § 4.410(a), we do not believe that the district court

erroneously refused to require them to do so. Where, as here, the doctrine of exhaustion of administrative remedies is not mandated by statute or regulation, "its application rests within the sound discretion of the trial court." *Southeast Alaska Conservation Council v. Watson*, 697 F.2d 1305, 1309 (D.C.Cir.1983). Absent such statutory command, exhaustion is a flexible requirement, tailored to "an understanding of its purposes and of the particular administrative scheme involved." *McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 1662, 23 L.Ed.2d 194 (1969). Ordinarily, further administrative review serves to allow the agency to make a factual record, to exercise its discretion, or to apply its expertise. It permits the agency to discover and correct its own errors and prevents the deliberate disregard of administrative processes through premature judicial intervention. *Id.* at 194-95, 89 S.Ct. at 1663.

None of these purposes would be served by requiring additional exhaustion here. Plaintiff has sought to present its objections to the agency by various methods: letters to the Secretary, letters to the BLM director, and numerous discussions with Interior and BLM officials. Agency officials were afforded ample opportunity to reflect on petitioners' contentions, to apply their expertise, and to "correct [any] error if error there be," *Brotherhood of Rail. Trainmen v. Chicago M., St. P. & P.R. Co.*, 380 F.2d 605, 608, *cert. denied*, 389 U.S. 928, 88 S.Ct. 289, 19 L.Ed.2d 279 (1967). "So long as the appellant * * * has put an objection on the record, the obligation to exhaust is discharged." *Safir v. Kreps*, 551 F.2d 447, 452 (D.C.Cir.1977).

The agency's failure to raise the exhaustion defense, coupled with a continuous course of action demonstrating a commitment to its view of the law, indicated to the district court that further administrative process would be futile. From the agency's silence, the court reasonably surmised that the Department had nothing more to add. Cf. *Asarco Inc. v. EPA*, 578 F.2d 319, 320-21 n. 1 (D.C.Cir.1978) ("The agency's failure to insist upon exhaustion * * * suggests that, in [its] view, the costs * * * do not outweigh the benefits of [the] court's immediate consideration [of the issues on appeal]."). In addition, the district court predicted that appellants would not change their mind on key legal questions during the course of any further hearings. The administrators have forged ahead with plans to modify the status of millions of acres of land despite continuous objection by petitioners over several years. Appellants have clearly considered and rejected plaintiffs' view of the statute's requirements for public participation and the timely promulgation of new Plans. Contrary to the dissent's implication, evidence that an agency has made up its mind on the law *is* relevant to the question of futility. *See, e.g., NRDC v. Train*, 510 F.2d 692, 703 (D.C.Cir. 1975); *Athlone Industries v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1489 (D.C.Cir. 1983); *Committee for GI Rights v. Callaway*, 518 F.2d 466, 474 n. 20 (D.C.Cir. 1975). Therefore, the court did not abuse its discretion by relying on the Department's irreversible commitment to its view of the law.

In concluding that the district court abused its discretion on exhaustion, the dissent assumes that the "factual" inquiry which it deems necessary to establish irreparable injury would be undertaken by the agency in hearings held to satisfy an exhaustion requirement. The prediction that the directed factual inquiry touted by the dissent would be conducted is simply implausible. In any appeal to the Board under 43 C.F.R. § 4.410(a), the focus of plaintiffs' objection would likely be, not the adverse effects of any particular termination decision or its consequences, but the statutory adequacy of the pre-FLPMA plans and the legal authority of the BLM to terminate classifications

under the FLPMA. Since the disposition of plaintiffs' objections before the Board would inevitably turn on the threshold resolution of legal issues on which the Department has made its position clear, the district court's rejection of the exhaustion defense was plainly appropriate.

D. *Laches*

Mountain States also argues that the district court erred in not finding that the Federation's claims are barred by the doctrine of laches. Appellant contends that publication in the *Federal Register* put the Federation on constructive notice of the withdrawal revocations and land classification terminations under the Program and that the organization unreasonably delayed in lodging its objections. Mountain states asserts that during the period between 1981 and the institution of this lawsuit, third parties relied on the apparent regularity of the Department's actions and made significant investments in the affected lands. In Mountain States' view, this detrimental reliance combined with the Federation's delay supports a finding of laches and bars issuance of a preliminary injunction as to the Department's past actions.

Mountain States never raised this issue before the district court. Ordinarily, issues and legal theories not asserted at the district court level will not be heard on appeal. *See District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C.Cir.1984). "[O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact." *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941). We do not believe that this case warrants departure from the normal rule. Laches is

an affirmative defense that requires findings that the plaintiff delayed inexcusably or unreasonably in filing suit and that the delay was prejudicial to the defendant. *See Rozen v. District of Columbia*, 702 F.2d 1202, 1203 (D.C.Cir. 1983). Whether the doctrine of laches bars an action depends upon the particular circumstances of the case. *See Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 843 (D.C.Cir.1982). The analysis is in large part fact-based and, in any event, is primarily addressed to the discretion of the trial court. *See Park County Resource Council*, 817 F.2d at 617 (noting judicially recognized principle that laches must be invoked sparingly in environmental cases); *Concerned About Trident v. Schlesinger*, 400 F.Supp. 454, 478 (D.D.C.1975), *aff'd in part, rev'd in part on other grounds*, 555 F.2d 817 (D.C.Cir. 1977). In such circumstances, it would be especially imprudent for an appellate court to address the issue in the first instance.

Having resolved these preliminary issues, we turn finally to consider the soundness under traditional equity standards of the district court's issuance of the preliminary injunction.

III. THE PRELIMINARY INJUNCTION

It is well-settled that the direct court must consider four factors in deciding whether a plaintiff is entitled to a preliminary injunction: (1) the plaintiff's likelihood of success on the merits; (2) the threat of irreparable injury to the plaintiff absent the injunction; (3) the possibility of substantial harm to other parties caused by issuance of the injunction; and (4) the public interest. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C.Cir.1977). After weighing these

factors, the district court concluded that a preliminary injunction should issue in this case. Appellants challenge the court's determination, asserting that each factor in the traditional preliminary injunction inquiry counsels dissolution of the injunction.

A district court's decision to grant or deny a motion for preliminary injunction is reversible only for abuse of discretion. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975); *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 151-52 (D.C.Cir.1985). In making its decision, the district court makes findings of fact, conclusions of law, and determinations about the balancing of the injunction factors. As to each, we owe the district court deference. We are most deferential to the court's balancing of the four injunction factors. *See id.* at 151-52. Questions of fact are reviewed under the clearly erroneous standard. *See Amoco Production Co. v. Village of Gambell, Alaska*, ___ U.S. ___, 107 S.Ct. 1396, 1404, 94 L.Ed.2d 542 (1987); *Foundation on Economic Trends*, 756 F.2d at 152. Although we are least deferential on legal issues, "we ordinarily do not consider the merits of the case further than necessary to determine whether that discretion was abused." *National Organization for Women v. SSA*, 736 F.2d 727, 733 (D.C.Cir.1984) (internal quotes and footnote omitted). We should overturn the district court's decision "when it rests its analysis on an erroneous premise or is clearly wrong in reaching its conclusions." *White House Vigil for ERA Committee v. Watt*, 717 F.2d 568, 571 (D.C.Cir. 1983). With these principles in mind, we examine the district court's decision to issue the preliminary injunction.

A. *Likelihood of Success on the Merits*

In considering the Federation's likelihood of success on the merits, the district court considered only two of the Federation's claims: first, that the Department's termination of land classifications without first preparing Plans violated FLPMA; second, that the Department failed to provide for public participation in their withdrawal revocation decisions contrary to FLPMA's command. It is undisputed that if the Federation ultimately prevails on these two FLPMA claims, it could obtain the permanent injunction it ultimately seeks. Thus, in light of the district court's conclusion that the Federation will likely succeed on these two counts, it correctly declined to reach the merits of the Federation's other claims. We review then the court's determination as to these two counts. We find that although the merits are close, the court did not rest its analysis on any erroneous premise and was not clearly wrong in the conclusions it reached; we therefore conclude that the court did not abuse its discretion in finding that the Federation is likely to succeed on the merits of these claims.

1. *Failure to review Land Status Actions in the Context of Land Use Planning*

As explained earlier, FLPMA established substantive land management criteria for public land, required the Department to engage in land use planning, and preserved withdrawals and classifications already in effect. Section 202 of the Act, which concerns classifications, directs the Secretary of the Interior to develop and emploiy "land use plans," which establish the use to which tracts and areas of federal lands may be put. 43 U.S.C. § 1712(a). This obligation applies regardless of whether the land has been

previously classified. *See id.* Subsection (d) further provides:

> Any classification of public lands or any land use plan in effect on October 21, 1976, is subject to review in the land use planning process conducted under this section, and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The Secretary may modify or terminate any such classification consistent with such land use plan.

43 U.S.C. § 1712(d). Department regulations identify the land use plans developed pursuant to FLPMA as Plans. *See* 43 C.F.R. § 1610.0-5(1). It is undisputed that the Department had completed only a miniscule number of Plans for the land covered by pre-1981 classifications during its implementation of the Program. The Department instead relied on Management Framework Plans (MFPs), developed before FLPMA's enactment under the C & MU Act in terminating the disputed land retention classifications under the Program.

The district court found that the Department's reliance on MFPs did not satisfy the statutory expectations of "land use plans." The court found that MFPs "are not identical substitutes" to Plans. Dec. 4th Order at 16. The court acknowledged that Congress anticipated that the agency would have to rely on MFPs for a certain period, until Plans were developed for all tracts of federal lands, but the court concluded that Congress only approved temporary reliance on MFPs, and that nine years was excessive. The court thus concluded that the Federation was substantially likely to succeed in establishing that the Department had violated FLPMA by terminating the classifications on 160 million acres of land without following the statute's criteria for land use plans.

Appellants argues that MFPs have been and continue to be legally adequate land use plans under FLPMA and therefore the Department reasonably relied on them in the terminations at issue. In support of this proposition, appellants cite language in the legislative history of FLPMA that indicates that Congress was aware of BLM's pre-FLPMA land use planning systems and "found them to be consistent in general principles and practices with the objectives of [the new legislation]." H.R.Rep. No. 1163, 94th Cong., 2d Sess. 5 (1976), U.S. Code Cong. & Admin.News 1976, pp. 6175, 6179. Appellants argue that this language coupled with a reference in section 302(a) to the use of land use plans prepared under section 202 "when they are available," 43 U.S.C. § 1732(a), indicates that Congress sanctioned the agency's termination of classifications without having prepared Plans. Finally, the Department argues that the district court's holding is controlled by *National Resources Defense Council, Inc. v. Hodel (NRDC)*, 624 F.Supp. 1045 (D.Nev.1985), *aff'd*, 819 F.2d 927 (9th Cir.1987). None of appellants' arguments persuades us that the district court was clearly wrong in reaching its conclusion.

A fair reading of the statute and the Department regulations convinces us that Plans and MFPs are not equally adequate to meet FLPMA's requirements with regard to establishment of land use plans. It is true that nothing in the Act or the legislative history distinguishes between MFPs and Plans. But the agency itself has identified the Plans as the land use plans mandated by the Act. Departmental regulations describe what the Plans are designed to generally establish and how they conform with the criteria for development and revision of land use plans stipulated by section 202 of FLPMA. The regulations then rehearse lengthy provisions regarding the procedures for development of Plans in order to comply with FLPMA require-

ments. *See* 43 C.F.R. Subpart 1610. The regulations also provide for the use of MFPs during a "transition period" until they are superseded by Plans. *See id.* at § 1610.8. The Department contends that the regulations permit reliance on MFPs under this section only if they conform to the prescribed planning standards of section 202 of FLPMA. But the regulations themselves belie this contention. There is nothing in the regulations that necessitates or directs such conformity. The regulations provide that the Department may rely on MFPs only if they comply with "the principle of multiple use and sustained yield and shall have been developed with public participation and governmental coordination." *Id.* § 1610.8(a)(1). These factors do not bring the MFPs into conformity with section 202; section 202 requires considerably more of the Department in establishing land use plans under FLPMA. These requirements include "use [of] a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences, . . . giv[ing] priority to the designation and protection of areas of critical environmental concern, . . . [and] weigh[ing] long-term benefits to the public against short-term benefits." 43 U.S.C. § 1712(c). Management decisions reached under MFP's limited criteria may be very different from those reached under Plans' criteria. Mountain States' contention that FLPMA works no change to the way in which BLM was to conduct land use planning is contradicted not only by the comprehensive statutory system but also by the Department's own regulations, which contemplate and instruct the development of entirely new land use plans to comply with FPLMA and to be called Plans. Although BLM's pre-FLPMA management system, as expressed in MFPs, may have conformed to the "general principles" of FLPMA, Congress did not approve the extended use of

existing plans in place of the plans mandated for development under FLPMA.

The Department's contention that Congress authorized BLM to proceed with management of the public lands using existing MFPs does not support its action. The Department relies on FLMPA's provision that

> The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available.

43 U.S.C. § 1732. This section evinces Congress' recognition that Plans would not be ready immediately and arguably speaks to Congress' intention that the Department's hands not be tied pending completion of the Plans. But this section cannot be read to override the specific language of section 202(d), the sole provision of the Act regarding modification of land use classifications, which provides that existing classifications may be modified or terminated only pursuant to FLPMA—developed land use plans. Moreover, the two provisions are not necessarily incompatible. There are presumably many management decisions embracing multiple use and sustained yield principles that do not necessitate terminating existing classifications; most C & MU classifications dedicated lands to multiple uses. Thus, the Act may reasonably be understood as permitting the Department to continue relying on existing MFPs with regard to those management decisions not involving termination of classifications. In any event, in light of section 202(d)'s plain language, we cannot find that the district court was clearly wrong in concluding that Congress did not sanction the termination of classifications covering the vast majority of federal lands outside the context of FLPMA land use plans.

Finally, *NRDC v. Hodel, supra,* does not contradict the district court's determination. The Department contends that the Ninth Circuit implicitly held that MFPs established by regulations and used by BLM for over ten years are valid under FLPMA. Actually, the holding of the case is not nearly so broad. In *NRDC,* environmental groups challenged certain livestock grazing decisions made by the BLM. The issue for the court's review was the adequacy of a specific MFP covering grazing in the Reno, Nevada area. The Ninth Circuit characterized the plaintiffs' complaint as "a challenge to the BLM's policy decision to postpone livestock grazing adjustment until reliable data was available." *NRDC,* at 930. The court held simply that the BLM's method of providing for grazing under the MFP did not violate FLPMA. *See id.* at 930. The adequacy under FLPMA of a single, specific MFP with regard to one planning decision has no relation to the lawfulness of the overall pattern and practice of the Department in ignoring FLPMA's land use planning requirements in terminating protective classifications under the Program. Contrary to the Department's assertion, *NRDC* does not stand for the proposition that MFPs are interchangeable with Plans for purposes of developing satisfactory land use plans under the Act.

It may be that when the district court proceeds to consider the merits of the claims on final review (or on summary judgment), it will conclude that the MFPs conform with the section 202 FLPMA land use planning criteria. However, the most reasonable inference drawn from the statute and from the Department's own regulations is that MFPs were not designed to and do not comply with FLPMA. Thus, we cannot find that the district court abused its discretion in concluding that the Federation is likely to succeed in providing that the Department violated

FLPMA in terminating classifications without first having developed Plans for the covered land.

2. ***Failure to Provide for Public Participation in Connection With the Revocation of Land Withdrawals***

FLPMA contains numerous provisions for public participation in the Department's decision-making. FLPMA states broadly that

> The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.

Id. § 1712(f). More particularly, section 309(e) of FLPMA directs the Secretary to provide for public participation in "the preparation and execution of plans and programs for, *and the management of*, the public lands." 43 U.S.C. § 1739(e) (emphasis added). The district court found that withdrawal revocations fall into the "management" category of section 309(e). Since the Department did not permit public input for its decisions to revoke land withdrawals under the Program, the court concluded that the Federation is likely to succeed on its claim that the Department violated section 309(e) of the Act. We can locate no evidence that this determination was incorrect.

Appellants proffer several arguments in opposition to the district court's conclusion, all of which are impotent. First, appellants contend that the statutory language of section 309(e) does not extend to the Secretary's withdrawal revocation authority under section 204 of FLPMA. In support of this interpretation, they call upon the Act's

legislative history. But, in fact, the legislative history does not speak to the issue, although there are strong indications that Congress intended some form of public input for all decisions that may have significant impact on federal lands. *See, e.g.*, H.R. Rep. No. 1163, 94th Cong., 2d Sess. 7 (1976), U.S.Code Cong. & Admin.News 1976, p. 6181. The Department also argues that the district court's reading renders section 204(h) superfluous. Section 204(h) provides that the Department may promulgate new withdrawals only after it has afforded an opportunity for a public hearing. *See* 43 U.S.C. § 1714(h). Contrary to the Department's position, there is nothing incongruous between this provision and the court's reading of section 309(e). The fact that Congress specifically mandated that a "hearing" precede new withdrawals does not mean that it did not contemplate some form of public participation, short of a public hearing, in connection with withdrawal revocations.

In a related argument, appellants contend that Congress intended public participation only in the context of the land use planning process, as opposed to individual BLM revocation decisions. This interpretation of section 309(e), however, reads "the management of public lands" language out of the statute. The section already provides for public input into "the preparation and execution of plans and programs for . . . the public lands." 43 U.S.C. § 1739(e). Such a negation of Congress' explicit language offends well-settled principles of statutory interpretation. *See, e.g., American Textile Manufacturers Institute, Inc. v. Donovan,* 452 U.S. 490, 513, 107 S.Ct. 2478, 2492, 69 L.Ed.2d 185)1981).

The Department contends that it satisfies section 309(e)'s requirement for public participation by providing for public participation in the development of the land use plans and in specific disposal decisions made after the

revocation, such as the decision whether to issue a lease or whether to conduct a sale or exchange. The appellants' contention that section 309(e)'s public participation requirement is satisfied by further provision for public input into particular disposal decisions fails to answer the specific requirements of the statute: withdrawal revocations are themselves major management decisions. Permitting the change in status of land from retention (even if for limited purposes) to disposal (even if for limited purposes) raises issues and concerns that are not the same as those that might arise when deciding how or to whom to dispose the land. Evaluating the repercussions of opening millions of acres to potential development entails different and graver considerations than judgments concerning the local impact and advisability of uses for particular parcels. The patchwork of provision for public comment on specific disposals cannot adequately substitute for public input into this important aspect of comprehensive planning. In addition, the discretionary nature of these public participation requirements dictates that many individual land disposal decisions will never be subject to meaningful public scrutiny.

In effect, the Department's practices have insulated large-scale withdrawal revocation programs such as these from public oversight, since the public has never been directly involved in formulating a systematic approach to withdrawal revocations. This total absence of public input into sweeping policy decisions affecting vast tracts of public land effectively frustrates the public participation requirement. For this reason, we cannot find that the district court was clearly wrong in deciding that section 309(e) of FLPMA contemplates some form of public participation in the Department's decision to revoke withdrawals on federal lands. We therefore conclude that the court did not abuse its discretion in concluding that the

Federation is likely to succeed on its claim that the Department violated FLPMA in revoking withdrawals under the Program without affording opportunity for public input.

B. *Irreparable Injury*

The district court has "no problem in holding that [the Department's] actions in lifting protective land restrictions will irreparably injure [the Federation's] members unless enjoined, . . . [because the Department has] removed the only absolute shield against private exploitation of these federal lands." Dec. 4th Order at 18. The court explained that although classification terminations and withdrawal revocations do not immediately open the lands to exploitation, the agency's actions leave no prohibitions on development in place: statutes and regulations can only regulate its process. The court stressed that any mining or leasing could cause irreparable injury by permanently destroying wildlife habitat, air and water quality, natural beauty, and other environmental and aesthetic values and interests. Moreover, sales, leases, and procedures whereby mining interests can gain exclusive use of the land would permanently remove the land from the public domain and enjoyment. In conclusion, the court stated that "[w]ithout the preliminary injunction, [the Department's] termination of classifications and withdrawals could lead to the permanent loss of lands to public use and enjoyment—an injury we feel would be irreparable," *Id.* at 19.

To the extent we can decipher appellants' objections to the district court's determination, we are not convinced that they should lead us to reverse the court's finding of irreparable injury as clearly erroneous. The Department begins its challenge by asserting, without elucidation, that the district court ignored the teaching of the Supreme Court in *Weinberger v. Romero-Barcelo,* 456 U.S. 305,

102 S.Ct. 1798, 72 L.Ed.2d 91 (1982), and *Amoco Production Co. v. Village of Gambell, Alaska,* ____ U.S. ____, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987). The Department's invocation of these cases is baffling. In both cases the Supreme Court reviewed a lower court's holding that a specific statute prohibits courts faced with an alleged violation from relying on remedies other than an immediate prohibitory injunction. *See Gambell,* 107 S.Ct. at 1398 n. 1 (Alaska National Interest Lands Conservation Act); *Romero-Barcelo,* 456 U.S. at 306-07, 102 S.Ct. at 1800 (Federal Water Pollution Control Act). In both cases, the Court concluded that in drafting the statute at issue, Congress did not intend to deny courts their traditional equitable discretion. *See Gambell,* 107 S.Ct. at 1403; *Romero-Barcelo,* 456 U.S. at 320, 102 S.Ct. at 1807. Accordingly, the Court directed the courts to engage in the traditional injunction inquiry, which is just the inquiry the district court conducted in this case. Unlike the lower courts in *Gambell* and *Romero-Barcelo,* the court did not *presume* irreparable injury; it examined the Federation's allegations and showings and determined that its members would be irreparably harmed absent the preliminary injunction. *Compare Gambell,* 107 S.Ct. at 1402. Thus, contrary to the Department's assertion, the district court followed the teaching of the Supreme Court in these two cases.

We reject appellants' suggestion that the district court was constrained to require the Federation to proffer specific evidence as to each tract of land, detailing just how the Department's further action pursuant to its Program would cause its members irreparable harm. The district court's determination about " 'what evidence can properly be adduced in the limited time that can be devoted to a preliminary injunction hearing' " is entitled to substantial deference. *Foundation on Economic Trends,*

756 F.2d at 151 (quoting *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 835 n. 32 (D.C.Cir.1984)). Given the breadth of the agency's action, the enormity of the land affected, the duration of the Program, and the preliminary nature of the proceeding, we cannot fault the court for not having further particularized its findings.

The record before the district court was complete enough to allow it to decide that any further action by the Department would irreparably harm the Federation's members' interests. The Federation alleged that absent preliminary relief its members would suffer irreparable damage because irreparable damage will be done to tracts of public land they use. The Federation has delineated specific ways in which, in the absence of the injunction, its members' interests in conserving natural resources for their aesthetic, recreational, and environmental use and enjoyment will be irreparably injured. In most instances, the original purpose of a withdrawal was to ensure that the lands so designated be retained in federal ownership and thereby serve public rather than private purposes; in the absence of such retention, the Department may take action, such as sales and exchanges, which would result in permanent loss of those lands to public access and enjoyment. Mountain States estimates the number of land exchanges and sales that have been completed or are currently being planned and negotiated to be in the thousands. In addition, in the absence of injunction, the Department is at liberty to grant rights of way, leases, permits, and easements, which may themselves substantially impair resource values. Pursuant to the Program, 13 million acres have been opened to mining. Under federal mining laws, anyone can enter open public lands, undertake excavation, stake mining claims, and set up mining operations. *See* 30 U.S.C. §§ 22, 23, 27, 35 (1982); *see also* 43 C.F.R.

§ 3809.0-6 (1986). Mining operations in turn have substantial adverse effects on scenery, wildlife, recreation, and other environmental values. Further, lands opened to mining may be permanently lost to the public under mining laws because mining claimants enjoy enforceable rights to exploit the minerals that they find and may proceed to gain title in fee simple. *See Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978). Finally, about 8 million acres have been opened to mineral leasing and 4.4 million acres have been opened to oil and gas leasing. The Leasing Act does not limit the Department's leasing authority, see 30 U.S.C. § 226(b), and pre-exploration and exploration activities often can begin soon after leases are awarded. These activities can cause immediate and direct physical damage to public lands. *See, e.g.*, BLM, *North Fork Well Final Environmental Impact Statement* (May 9, 1985) at 60-61 (detailing unavoidable impacts associated with exploratory drill site, including big game habitat displacement, loss of visual resources, and loss of recreation setting). Mountain States asserts that 7,000 mining claims have been located and 1,000 mineral leases have been issued on lands that were previously closed to mining or mineral leasing.

Appellants do not, nor could they reasonably, argue that the injuries the Federation and the district court envisioned would not be irreparable. Mountain States, however, challenges the Federation's showing on other grounds, all of which we reject. At times, Mountain States maintains that the Federation must demonstrate as a matter of fact that its members have already suffered irreparable injury from the Department's actions. This contention is absurd. A preliminary injunction is designed to *prevent* irreparable injury; its value would be totally eviscerated if the plaintiff had to show that the harm had

already occurred before the court could issue the injunction.

At other times, Mountain States concedes that a showing that plaintiff *will* suffer irreparable injury is sufficient, but contends that such a showing cannot be made here because the potential irreparable harms are too remote: with the exception of locating mining claims, all other forms of entry are dependent on the Secretary's exercising his discretion to permit entry. In this regard, Mountain States appears to misunderstand the purpose of the preliminary injunction; it is designed precisely to prevent the Secretary from exercising his discretion in circumstances in which it likely would lead to irreparable injury. Furthermore, the harm is not so remote as appellant suggests. Mountain States' own position that the injunction impermissibly affects the interests of absent third parties demonstrates with ample illustrative examples that these parties are chomping at the bit to develop the interests in the federal lands under the Program. Appellant made clear that but for the injunction, the Secretary would be exercising his discretion to permit entry to many third parties. And the imminent actions, which include transfers, sales, and mineral and mining developments, would trigger the very irreparable harms the Federation has alleged.

Finally, Mountain States contends that the Federation has failed to demonstrate an adequate connection between its individual members and the threatened harm. Appellants' argument mirrors its standing claim and suffers from the same infirmity. As noted earlier, the affidavits supplied by the Federation specifically identify locations where its members' interests are threatened by the Department's actions in lifting restrictions on mining and other forms of natural resource exploitation. Indeed, according to the Department, mineral claims have already been staked in an area in which one member uses and enjoys the resources.

At bottom, appellants' argument is that the district court's preliminary injunction is overbroad. Appellants observe that only about 14% of the total acres subject to the injunction have been opened to mining or some form of natural resource leasing, and claims have been issued on only a small portion of those lands. Appellants argue that the injunction for the most part enjoins activity that poses no threat to the Federation's members' interests. The Federation has admitted that its priority is contesting the opening of the land to mineral exploration and mining, but these activities are not the only threats to the members' interests. The Federation is also concerned about public lands being opened to settlement, agricultural uses, sales, and exchanges. Such disposals, especially sales and exchanges, can deprive the members of the use and enjoyment of the lands' resources altogether. Pursuant to the classification terminations, millions of acres have been opened to such uses. The evidence reveals that there have already been more than 260 agricultural entries, more than 430 proposed sales, and some 60 proposed land exchanges. The evidence of overbreadth is therefore far less compelling than appellants would have us believe.

There may be instances in which a proposed land use or disposal would not cause irreparable harm to the Federation's members' interests. But this does not necessitate the dissolution of the preliminary injunction. The district court retains the power to modify the injunction in the exercise of its sound discretion. In fact, the district court has implemented a procedure whereby specific tracts of land may be exempted from the preliminary injunction upon a proper showing. In our view, this procedure adequately protects the rights of third parties and the Department from any potential overbreadth in the injunction order.

C. *Possibility of Harm to Other Parties*

When considering a motion for preliminary injunction, the court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Gambell,* 107 S.Ct. at 1402; *see also Romero-Barcelo,* 456 U.S. at 312, 102 S.Ct. at 1803. In deciding to issue the preliminary injunction, the district court acknowledged that the injunction would harm third parties by barring holders of claims and leases from developing their interests and by delaying the investment return of those who have made investments to obtain access to or use of the lands covered by the injunction. The court noted, however, that the injunction itself would not sever these parties' interests, but only delay their realization. In light of this assessment, the court concluded that the injury to third parties was not "so serious as to outweigh the other factors supporting the injunction." Dec. 4th Order at 19.

In arguing that the district court's balancing of the competing interests was defective, appellants simply reiterate their prior arguments: the threat of irreparable harm to the Federation's members absent the injunction is remote, speculative, and slight, whereas the harm to third parties as a result of the injunction is immediate and palpable. We have already addressed appellants' attempts to belittle the threat of irreparable harm; their attempts to inflate the injury to third parties is equally hollow. The court was careful to craft the injunction so that third parties' interests would be adversely affected as little as possible. The injunction does not invalidate existing mining claims or mineral leases, nor does it overturn completed sales or exchanges. The post-1981 revocations and terminations are "suspended," not voided; therefore, the mining leases and claims issued during that time are not invalidated. The

possible harm to third parties is delay, a cloud on title (which would have been caused to some degree by the litigation itself, even absent the preliminary injunction), and investment costs. The district court reasonably held that the permanent loss of aesthetic values and environmental resources, not to mention access to the land itself, outweighed the possible injury to third parties due to the preliminary injunction.

D. *The Interest of the Public*

The district court held that "the public interest clearly favors granting the preliminary injunction." Dec. 4th Order at 20. This conclusion relied predominantly on FLPMA's policy statement announcing the importance of ensuring orderly procedures for removing certain federal controls over government-owned lands. *See* 43 U.S.C. 1701(a)(1). The court reasoned that if the agency had violated FLPMA's procedures, the injunction would protect against further illegal action pending resolution of the merits. In addition, the court held that the injunction would serve the public interest in protecting the environment from any threat of permanent damage. The court concluded that although the preliminary injunction would inconvenience the Department and those parties holding interests acquired under the Program, the public interest favored issuance of the injunction, since "denying the motion could ruin some of the country's great environmental resources—and not just for now but for generations to come." Dec. 4th Order at 21.

Mountain States argues that the district court failed to weigh all of the applicable public interest considerations set out in FLPMA's policy statements, particularly the Act's directive that all BLM lands be managed to provide for multiple use and sustained yield, with some emphasis

on the importance of developing natural resources. *See* 43 U.S.C. §§ 1701(a)(7), (12). Introduction of Mountain States' "missing" considerations, however, does not change the balance of interests. The interests that Mountain States claims are missing are accounted for by FLPMA itself, and it is FLPMA which guided the court's determination that the public interest favors the granting of the preliminary injunction. FLPMA created a scheme whereby BLM's management of public lands would be subject to specified procedures that mandate consideration of numerous factors. Thus if BLM is violating those procedures, its revocations and terminations may not represent the proper balance of competing uses of public land. Contrary to Mountain States' suggestion, the district court is not proclaiming that mining and mineral exploration is always bad or that retention of pristine public lands is necessarily good. Nor does the court's order prevent multiple use of the affected lands. The injunction simply preserves the multiple uses structured before the Department started reordering the scheme. We cannot find that the district court abused its discretion in this regard.

CONCLUSION

This is a serious case with serious implications. The Department has reordered the balance of public versus private interests with respect to 180 million acres of federal land. Prompted by the Federation's charges that the Department's land status changes violate the agency's organic statute, the district court has stopped the Department midstream. Not surprisingly, the Department and private parties with an interest in preserving and furthering the Department's actions have mounted attacks on every front in order to defeat the Federation's advance at this preliminary stage of the battle. Some of their jabs are not without

force. Nevertheless, we conclude, for the reasons stated above, that the district court acted well within its sound discretion, and we therefore sustain the preliminary injunction issued by the court. The district court's order is

Affirmed.

WILLIAMS, Circuit Judge, concurring and dissenting:

The majority today upholds a district judge's self-appointment as *de facto* Secretary of the Interior over 180 million acres—nearly one-fourth of all federal lands and more than half of the public lands managed by the Bureau of Land Management ("BLM"). It does so without a showing that the BLM breached any legal requirement as to a single parcel of land. Even assuming such a breach, the record is barren of any hint that it was material or likely to harm plaintiffs' interests—much less irreparably. Unable to sanction such a judicial usurpation of power, I dissent.

Part I addresses various procedural problems, Part II the merits of the preliminary injunction.

I. PROCEDURAL MATTERS

A. *Standing*

At this point in the proceeding the issue of standing is largely academic. The district court found that Congressman Seiberling had standing and did not consider that of the National Wildlife Federation ("NWF"). It marched on with the injunction proceedings that resulted in this appeal. During this process, a record developed that supplemented the vague allegations appearing NWF's complaint. By the time the case was submitted to this court, the defendants appear to have conceded the bare minimum necessary for standing.

I write separately on this issue in the hopes of clarifying what a plaintiff must show to meet the injury-in-fact com-

ponent of standing when it seeks a preliminary injunction. The gaps that lingered for some time in this record appear to have been quite unnecessary.

NWF challenges the legality of two programs—classification terminations and withdrawal revocations—that together affect over 180 million acres of public lands. To bring this challenge NWF must show that each program has impaired, or seriously threatened to impair, its members' use and enjoyment of either the subject lands or neighboring ones. This requires that NWF (1) identify lands that are affected by each program; (2) demonstrate that third parties are likely to respond to the regulatory changes with development activities; and (3) identify activities of members in specific areas that would suffer an adverse impact from such third-party conduct. *See, e.g., Sierra Club v. Morton,* 405 U.S. 727, 733, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 688-89, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973); *Wilderness Society v. Griles,* 824 F.2d 4, 10-12 (D.C.Cir.1987).

The specificity required on each of these points is of course a function of the posture of the case. *SCRAP,* 412 U.S. at 689-90 & n. 15, 93 S.Ct. at 2417 n. 15; *Wilderness Society,* 824 F.2d at 16. In *Wilderness Society,* we explained that "while a motion to dismiss may be decided on the pleadings alone, construed liberally in favor of the plaintiff, a motion for summary judgment by definition entails an opportunity for a supplementation of the record, and accordingly a greater showing is demanded of the plaintiff." *Id.* We also noted that plaintiff's opportunity for discovery in resisting summary judgment supported insistence on greater specificity at that stage. *Id.* at 16 n. 10.

Both *Wilderness Society* factors—opportunities to supplement the record and to engage in discovery—will normally be present where plaintiff seeks a preliminary injunction.[1] Moreover, plaintiff in this context must carry its affirmative burden of showing a likelihood of success on the merits; this necessarily includes a likelihood of the court's *reaching* the merits, which in turn depends on a likelihood that plaintiff has standing. It follows that the specificity required for standing allegations to secure a preliminary injunction will normally be no less than that required on a motion for summary judgment.

It is true that *SCRAP* involved motions to dismiss and for a preliminary injunction, *see* 412 U.S. at 689 n. 15, 93 S.Ct. at 2417 n. 15, and that the Court's standing analysis did not distinguish between the two, *see id.* at 683-90, 93 S.Ct. at 2413-17. However, as the Court concluded that the district court completely lacked jurisdiction to issue an injunction, *id.* at 690, 93 S.Ct. at 2417, that silence is of little moment.

The Court's later decisions are at least congruent with the view that a preliminary injunction requires a more powerful showing. In *O'Shea v. Littleton,* 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), for example, the Court first found that a complaint against certain judicial officers alleging discrimination in criminal law enforcement and seeking injunctive relief failed to allege a case or controversy because of the speculative character of the injury foreseen. *Id.* at 493-99, 94 S.Ct. at 675-77. It then observed that the same considerations "obviously shade into those determining whether the complaint states a sound basis for equitable relief," *id.* at 499, 94 S.Ct. at

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[1] *But see infra,* for discussion of *Palmer v. City of Chicago,* 755 F.2d 560 (7th Cir.1985), and the problem of special exigencies limiting those opportunities.

677, and analyzed the complaint under traditional equitable principles—irreparable injury and adequacy of the remedy at law. *See also Allen v. Wright,* 468 U.S. 737, 760-61, 104 S.Ct. 3315, 3329, 82 L.Ed.2d 556 (1984); *City of Los Angeles v. Lyons,* 461 U.S. 95, 103, 103 S.Ct. 1660, 1665-66, 75 L.Ed.2d 675 (1983).

The exact degree of specificity required of a plaintiff depends, to be sure, on the nature of its claim and the exigencies of the situation. Thus, where a preliminary injunction was needed simply to *preserve* files claimed by plaintiffs to substantiate their claims, the court imposed only a modest burden on them. *Palmer v. City of Chicago,* 755 F.2d 560, 573 (7th Cir.1985). *See Wilderness Society,* 824 F.2d at 16-17 & n. 10 (on motion for dismissal for want of jurisdiction, Fed.R.Civ.P. 12(b)(1), or motion for summary judgment, court must give plaintiff chance to discover evidence relevant to jurisdiction). And of course if facts relating to standing are put in issue, the court must address those conflicts. *See SCRAP,* 412 U.S. at 689, 93 S.Ct. at 2416 ("the allegations must be true and capable of proof at trial"); *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975) ("it is within the trial court's power . . . to require the plaintiff to supply . . . further particularlized allegations of fact deemed supportive of plaintiff's standing"). Here, NWF has direct access to the evidence necessary to flesh out its claim of standing. Thus it is appropriate for the court to insist on allegations indicating specifically that defendant's acts are likely to lead to third-party conduct, in specific places, such as to injure plaintiff's members in their use of specific lands.

NWF's submissions were adequate on the identity of the lands affected by the regulatory status changes. Its complaint cites the passages in the Federal Register that affected [*sic*] the challenged classification terminations and

withdrawal revocations; these passages identified the lands by legal descriptions. Complaint, Joint Appendix ("J.A.") at 15-16; Exhibit A, J.A. at 30-47 (citing notice given in Federal Register of each such act). *Compare Wilderness Society,* 824 F.2d at 12 (plaintiffs' claim of standing fails because affected lands not identified).

As to the other elements, NWF's submissions were markedly defective. Its complaint alleges that "[m]embers of NWF use and enjoy the environmental resources that will be adversely affected by the challenged actions." Complaint, J.A. at 15. This is too vague. The defect is similar to that in *Wilderness Society,* though not identical. There plaintiffs alleged use of federal lands throughout Alaska, and claimed impairment through transfer of federal lands to the state. We responded that the lands affected by the challenged policy might not overlap with those used by plaintiffs, 824 F.2d at 15, and said that the "absence of specificity regarding location dooms plaintiffs' claim of threatened injury." *Id.* Obviously the requirement of specificity cannot be met by plaintiffs' simply using broadened allegations (asserting use of "the environmental resources" rather than "various" lands, as in *Wilderness Society*).

After the injunction issued, NWF attempted to "further particularize[ ]" its allegations by submitting the affidavits of two of its members. *Cf. Warth v. Seldin,* 422 U.S. at 501, 95 S.Ct. at 2206. The affidavits themselves are still too vague. They merely state that the affiant uses "the federal lands, including those in the vicinity of [the South Pass-Green Mountain area of Wyoming (for one affiant), and the Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest (for the other affiant)] for recreational purposes and for aesthetic enjoyment." J.A. at 372, 376. While a court conceivably could match the legal descriptions in the Federal

Register with these broad stretches of land, it has neither the legal obligation nor the resources to do so.

Further, NWF's complaint alleges, again in the most general terms, that private parties will avail themselves of the withdrawal revocations and classification terminations to develop the lands in a manner incompatible with its members' uses. The affidavits are only slightly more specific, alleging that the lands used by the affiant (or lands in their vicinity) have been "opened to the staking of mining claims," J.A. at 373, 377, or to oil and gas leasing, J.A. at 373. They do not trace the opening of the lands to either of the two challenged programs, do not assert (much less substantiate) that the "opening" was likely to lead to mining or oil or gas development, and do not specify how such activity would interfere with their uses.

The record, however, provides modest support for the inference that some types of the disputed regulatory status changes have a material likelihood of leading to development activity potentially injurious to the activities of plaintiff's members on the lands named in the affidavits. BLM data show that withdrawal revocations have opened over 12 million acres to mining, and classification terminations over 800,000 acres. These resulted in the filing of about 7,000 claims and the filing of plans for operations with respect to 540 acres. *See* J.A. at 64-70, 94-96. 540 acres worth of activity is not much, out of 180,000,000 acres, but, bearing in mind that *threatened* environmental damage is also a ground of standing, it seems minimally sufficient. Combined with the concession at oral argument that some of the acreage opened to mining was in the vicinity of lands used by one of plaintiff's members in Arizona,[2] this seems to me to minimally meet the standing requirement.

[2] Counsel for Mountain States acknowledged status changes relating to lands described by the Wyoming NWF member, but stated that these merely opened to mining claims areas not containing min-

B. ***Exhaustion***

In a motion to reconsider the district court's order granting a preliminary injunction, Mountain States Legal Foundation, a public interest law firm that intervened on the side of the defendants, raised the question of whether plaintiff exhausted available remedies as to the classification terminations. It raised no such claim as to the withdrawal revocations, without explanation. The government defendants make no exhaustion claim at all. The district court rejected the defense. I believe this was an abuse of discretion.

First, the silence of the government defendants might be deemed a waiver. But that appears consistent neither with the principles of exhaustion nor with circuit law. The exhaustion requirement serves not only interests of agency autonomy but also interests of the courts:

> Exhaustion generally is required as a matter of preventing premature interference with agency processes, so that [1] the agency may function efficiently and [2] so that it may have an opportunity [a] to correct its own errors, [b] to afford the parties and the courts the benefits of its experience and expertise, and [c] to compile a record which is adequate for judicial review.

Weinberger v. Salfi, 422 U.S. 749, 765, 95 S.Ct. 2457, 2467, 45 L.Ed.2d 522 (1975). The considerations in the second group plainly bear on important concerns of judicial economy. Government neglect cannot force courts to disregard those concerns.

erals of more than nominal value. *See* p. 334 *infra* for discussion of classification terminations based on lack of mineral interest. For such areas, the likelihood of private development activity seems too remote to meet the *Wilderness Society* standard.

Indeed, this court has not regarded an agency's failure to invoke the exhaustion defense as a binding waiver. In *Asarco, Inc. v. EPA*, 578 F.2d 319, 320-21 n. 1 (D.C.Cir. 1978), one petitioner raised an argument that another claim had not been made in the administrative proceedings. The court said that indeed the argument had been made, but set out alternative grounds for treating the merits. First, it read the EPA's silence on the issue as evidence that EPA saw no harm to its institutional interests:

> First, EPA itself did not move for dismissal on grounds of exhaustion or join in intervenors' motion. The agency's failure to insist upon exhaustion in this particular case suggests that, in EPA's view, the costs—in terms of interfering with agency proceedings, creating an incentive to ignore agency processes in the future, and depriving the agency of a greater opportunity to apply its expertise or of a chance to "correct its own errors"—do not outweigh the benefits of this court's immediate consideration of Sierra's petition. *See* K. Davis, Administrative Law of the Seventies § 20.00 (1977 Sup.); *cf. Weinberger v. Salfi*, 422 U.S. 749, 764-67, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975).

Id. The court then invoked two additional factors in support of dispensing with the requirement: first, the issues were purely ones of law, not requiring "a record of fact-finding developed by an agency with special expertise"; second, as other parties had raised "essentially the same question," it was appropriate to consider both at the same time. *Id.* Obviously the court regarded agency silence as something to be considered, but not a dispositive factor. *Cf. Granberry v. Greer*, __ U.S. __, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987) (in habeas action by state prisoner, state's failure to raise exhaustion defense in federal district court does not bar court of appeals from dismissing for want of exhaustion; but failure to exhaust is not jurisdictional).

Given the discretionary character of the exhaustion defense, this court may only reverse if it finds that the district court's disposition of the issue was an abuse of discretion. *Hayes v. Secretary of Defense*, 515 F.2d 668, 674-75 (D.C.Cir.1975); *Industrial Workers of the World v. Clark*, 385 F.2d 687, 692 (D.C.Cir.1967), *cert. denied*, 390 U.S. 948, 88 S.Ct. 1036, 19 L.Ed.2d 1138 (1968); *Southeast Alaska Conservation Council v. Watson*, 697 F.2d 1305, 1309 (9th Cir.1983).

In rejecting the exhaustion defense, the district court characterized the issues in this case as purely "legal." J.A. at 169. As my substantive analysis should make clear, that characterization simply neglects the core issue in the case: whether the land use plans used by the BLM in terminating classifications failed in any material way to live up to the standards imposed by the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq.* (1982). Had plaintiff sought review in the Board of Land Appeals, the Board would have compared the land use plans actually relied upon by the BLM (discussed below at pp. 19-20), and evaluated them for compliance with FLPMA § 202(d), 43 U.S.C. § 1712(d), the provision here alleged to have been violated. If it found any deficiencies in the plans, it would presumably have considered whether correction of any of those deficiencies would have any prospect of affecting the planning outcome; in so doing it would have assessed the potential impact on the substantive values involved, including plaintiff's environmental interests. Thus the issues that would have been before the Board (and are now before us) seem to me as fact-rich as one can imagine. This case implicates, as strongly as possible, the values of allowing the agency to correct possible

errors, to employ its expertise, and to build an intelligible record for judicial review.

The district court also found that the department regulation permitting review of BLM decisions by the Interior Board of Land Appeals did not open the door to one in plaintiff's position. It reads:

> (a) Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative law judge shall have a right to appeal to the Board. . . .

43 C.F.R. § 4.410(a) (1986). *See* J.A. at 167.

Plaintiff had not been a "party" to a "case" before the BLM. But at least where there has been no formal adjudication before the BLM, the Board appears not to insist on any particular kind of participation before the agency. For example, in *Desert Survivors,* 80 IBLA 111 (1984), the Board said plainly, "As one adversely affected by a BLM decision on a protest, appellant is a party to the case." *Id.* at 113. It went on to note that appellant had been an active participant in the planning of the Wilderness Study area in question and the development of the mining plan at issue; but it in no way suggested that this was a requirement of standing. While the Board might conceivably limit appeal to participants below, *Desert Survivors* hardly stands for the proposition that it now does so. Even if it did, plaintiff itself claims to have corresponded on these matters with high-level officials within the Department for over a year, Brief for Appellee at 56, and offers no reason to believe that such involvement would not meet whatever precondition might possibly be inferred from *Desert Survivors.*

The only other decision to which anyone has called our attention, *Park County Resource Council, Inc. v. Department of Agriculture,* 613 F.Supp. 1182 (D.Wyo.1985), *aff'd on other grounds,* 817 F.2d 609 (10th Cir.1987), appears of marginal relevance. Plaintiffs sought review of challenges to the BLM's issuance of (1) an oil and gas *lease* and (2) a drilling *permit.* The district court applied the doctrine of exhaustion to the lease dispute, as plaintiff had never sought IBLA review. This obviously reflected the court's assumption that IBLA review was available. As the point was evidently not argued, and we have no information about plaintiffs' participation before the BLM, the court's assumption sheds no light on the proper construction of § 4.410(a). On appeal, the Court of Appeals for the 10th Circuit rejected the district court's application of exhaustion to the lease dispute, on a variety of grounds. Insofar as it found IBLA unavailable as an administrative avenue of redress, it did so *only* on the grounds that the time limit had run. 817 F.2d at 619. I do not take the majority here to be adopting the view that exhaustion is excused whenever parties let the time for administrative review expire, a proposition as novel as it would be destructive.

Finally, the district court believed that exhaustion would be futile, that the record showed the department irreversibly committed to its view of the law. J.A. at 169. But departmental commitment to a particular view of the law would not show futility at all: administrative proceedings focused on the actual decisions and tracts would undoubtedly have clarified the *relation* between facts and law, the critical element in this case.

Accordingly, I believe the district court abused its discretion in rejecting the exhaustion defense.

C. *Indispensable parties*

Federal Rule of Civil Procedure 19 orders the joinder of certain parties where it is feasible to do so, and it appears to be assumed on all hands that this standard is met by the

holders of certain types of property interests on the public lands affected by this litigation: those whose titles (perfected or inchoate) depend upon terminations or revocations made since January 1, 1981. Such parties' interests are directly affected by the district court's preliminary injunction (in its ultimate form), for it bars the defendants from taking any administrative action dependent on such terminations or revocations, "including, but not limited to" granting of rights-of-way or approval of plans of operations. Thus, for example, the holder of a mineral lease will not be able to secure approval of any application for a permit to drill; without the permit, of course, he cannot make his lease productive. Similarly, a holder of mining claims will not be able to secure approval of plans of operations, which is required for operations involving five or more acres, *see* 43 C.F.R. § 3809.1-4 (1986); this disability condemns such claims at least temporarily to barrenness.

When such parties are identified under Rule 19(a) and cannot be joined, Rule 19(b) requires the court to consider four factors in choosing whether the litigation should proceed or be dismissed:

> The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

The district court proceeded through the required analysis, finding the balance to tilt in favor of permitting

the suit to continue. Courts of appeals typically review such findings under an "abuse of discretion" standard. *See Northern Alaska Environmental Center v. Hodel,* 803 F.2d 466, 468 (9th Cir.1986); *Pulitzer-Polster v. Pulitzer,* 784 F.2d 1305, 1309 (5th Cir.1986); *Envirotech Corp. v. Bethlehem Steel Corp.,* 729 F.2d 70, 75 (2d Cir.1984). Here I believe there has been no abuse.

The district court understandably stressed item four—the difficulties that plaintiff would encounter if unable to proceed here. J.A. at 147-48. If application of Rule 19 to this situation generated the principle that the administrative challenge could not proceed in the absence of such property owners, then plaintiff could secure adjudication only by bringing separate suits in each of the 17 states where federal land has been affected by the asserted administrative delinquencies. Normally 17 suits would not seem a hopelessly large number for litigation affecting 180 million acres of land. Each lawsuit would apply on average to more than 10 million acres, which for most of us is quite a lot. Nonetheless, it would entail a multiplication of the litigation, perhaps for little advantage.

On the other hand, the district court squarely confronted the difficulties that non-participation could inflict on the absentees. By forcing the defendants automatically to deny approval of plans of operations, the injunction denies mining claimants exclusive possessory rights to which they are otherwise entitled by law, 30 U.S.C. § 26 (1982). It erects similar barriers to mineral lessees. (The majority's suggestion that the "right [of holders of such property interests] to use and enjoyment of that property is not affected by the court's order," Maj. at 315, is simply incorrect. *And see Sierra Club v. Peterson,* 717 F.2d 1409, 1414 (D.C.Cir.1983) (under usual mineral lease Interior has no absolute right to preclude development).) Further, the court noted that as only the absent parties could

measure the value of their interests and the effect of the prospective impairments, the presence of defendants and intervenor Mountain States Legal Foundation was not a complete substitute for their own direct involvement. J.A. at 146-47.

Nevertheless, seeing little impact from the other two Rule 19 factors—the risk that a judgment rendered in the absence of the omitted parties might not afford plaintiff relief and the court's ability to reduce the prejudice to absentees by the shaping of relief—the court found dismissal unsuitable.

Of course under the Due Process clause of the Fifth Amendment persons normally cannot be bound by litigation to which they were not parties or privies. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 327 n. 7, 99 S.Ct. 645, 649 n. 7, 58 L.Ed.2d 552 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party nor a privy and therefore has never had an opportunity to be heard"); *Hansberry v. Lee,* 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). We may assume, then, that the absentees are not legally bound by this adjudication. Yet their interests are severely affected, in the ways acknowledged by the trial court.

In considering whether this outcome is acceptable under Rule 19 and the Due Process clause, the remedies available to the absentees are surely relevant. Assuming that they are not legally bound, I take it that, for example, a mineral lessee that was denied a drilling permit to which it would otherwise be entitled could seek judicial relief against the BLM. A federal court outside this district would not be bound by the decision in the trial court or here, and, if it viewed the law differently, might order relief. In addition, such parties could protect their interests—at some expense—by intervening in the litigation here. (Their interest in the *stare decisis* effect of this litigation would likely entitle them to intervention as of right under Fed.R.Civ.P. 24(a)(2); *see Nuesse v. Camp,* 385 F.2d 694, 701-02 (D.C. Cir.1967); *Atlantis Development Corp. v. United States,* 379 F.2d 818 (5th Cir.1967).)

Moreover, administrative litigation commonly inflicts drastic effects on absent third parties. Perhaps the most radical example is that culminating in *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954), imposing federal price controls on independent gas producers' wellhead sales of gas into the interstate market. Legal interpretations emerging from such proceedings are legitimized (we hope) by the crucible of litigation—the presence of parties motivated to present a neutral court with the most persuasive arguments. Though the parties here are not complete substitutes for the absent ones, as the district court acknowledged, the potential unfairness seems in accord with what we often tolerate.

II. THE PRELIMINARY INJUNCTION

As relevant here, NWF has challenged (1) the Secretary's termination of classifications—covering 160.8 million acres of federal land—without legally sufficient "land use plans" and (2) the Secretary's revocation of withdrawals—affecting 20 million acres—without adequate public participation. In order to prevent these actions from leading to shifts in the character of the lands until its claims are adjudicated, NWF sought and obtained a preliminary injunction staying the effects of the Secretary's actions.

"It goes without saying that an injunction is an equitable remedy. It 'is not a remedy which issues as of course.' " *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 311, 102 S.Ct. 1798, 1802, 72 L.Ed.2d 91 (1982) (citation omitted). A party seeking a preliminary injunction must prove that

the balance of four elements favors such relief:

> (1) the plaintiff's likelihood of success on the merits; (2) the threat of irreparable injury to the plaintiff absent the injunction; (3) the possibility of substantial harm to other parties caused by issuance of the injunction; and (4) the public interest.

Maj. at 318 (citing *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312-13, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir.1977)). I believe that NWF fails this test.

A. *Classification Terminations*

NWF maintains that the Secretary has violated § 202 of FLPMA, 43 U.S.C § 1712 (1982), by terminating land classifications on 160.8 million acres of federal lands without adequate land use planning. The Secretary has terminated a classification order only if it fell within one of four categories:

> a. The order does not include any segregative language, e.g., merely "classified for retention," since the retention-disposition issue was resolved by Section 102 of FLPMA.
>
> b. The order segregates against applications under laws which were repealed by FLPMA.
>
> c. The order segregates against discretionary land laws . . . and a Management Framework Plan (MFP), Resources Management Plan (RMP), or special area plan . . . is in place and provides an adequate basis for acting on applications which may be filed under those laws.
>
> d. The order segregates against operation of the mining laws, but the lands involved do not contain minerals of more than nominal value, . . . and there has been no serious interest expressed in mineral development.

Organic Act Directive No. 81-11, at 2 (June 18, 1981), J.A. at 97-B.

It seems highly unlikely that the reclassifications falling in categories (a), (b) or (d) would result in any new entry, development or disposal. Indeed, NWF makes no such claim. Rather, it focuses its attack on a subset of category (c) reclassifications—those based on MFPs, a designation used by the BLM for plans prepared *before* the adoption of FLPMA. (There is no revelation by the district court why the injunction should address reclassifications under (a), (b) or (d).)

Section 202(d) provides that "[t]he Secretary *may* modify or terminate any [land] classification consistent with . . . land use plans" that have been "developed pursuant to this section." 43 U.S.C. § 1712(d) (1982) (emphasis added). Section 202(c) enumerates nine criteria for the development of plans[3] and § 202(f) requires the Secretary

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[3] Section 202(c) provides as follows:

> (1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;
>
> (2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;
>
> (3) give priority to the designation and protection of areas of critical environmental concern;
>
> (4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;
>
> (5) consider present and potential uses of the public lands;
>
> (6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;
>
> (7) weigh long-term benefits to the public against short-term benefits;
>
> (8) provide for compliance with applicable pollution control

to provide an opportunity for public involvement. 43 U.S.C. §§ 1712(c), (f). Since MFPs by definition antedate FLPMA, NWF argues that they have necessarily not been "developed pursuant to this section [§ 202]," and accordingly do not provide a legal basis for reclassification. *See* Brief for Appellee at 27-30.

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laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and

(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under the Act of September 3, 1964 (78 Stat. 897), as amended [16 U.S.C.A. § 4601-4 et seq.], and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

NWF's theory builds, of course, entirely on a negative pregnant: from the authorization of classification decisions based on § 202 plans, it infers an absence of authority to make such decisions without them. In fact the full context of § 202 militates against drawing such an inference in the rigid form required for NWF to prevail.

In enacting FLPMA, Congress made clear not only its familiarity with the BLM's land use planning procedures, but its approval. It seems fair to infer that Congress contemplated reliance on pre-FLPMA plans when they substantially conformed to the process specified in § 202, at least for some time.

FLPMA arose in large part out of the Report of the Public Land Law Review Commission, *One Third of the Nation's Land* (1970), which specifically appraised the quality of land-use planning by the BLM. Far from finding the existing practices defective, it appeared to regard them as deserving codification. First the authors described the process:

> BLM's recent [land use planning] efforts appear to require consideration of the following general categories of factors in varying degrees: physical and locational suitability of the lands or resources for obvious purposes; supply of resources and demand for resource products; communities and users dependent on the public lands and resources; environmental factors; impact on state and local governments; efficiency of resource use and sustained yield of renewable resources; and regional economic growth.

Id. at 46. Then it commended them and proposed their use by Congress as at least the foundation of a codified scheme for land-use planning:

> We have profited by this implementation of the Classification and Multiple Use Act and endorse the gen-

> eral planning approach embodied in that system. It is now time for Congress to rely on this experience by establishing legislatively those factors that should be considered in all Federal land use planning. The factors identified in the preceding paragraph provide an adequate starting point.

Id.

The elements identified in the first paragraph clearly correspond to a large degree with those specified in § 202. Congress apparently accepted the Commission's favorable judgment. The House Committee Report observed:

> The Committee is well acquainted with the land use planning systems of the Bureau of Land Management and the Forest Service and has found them to be consistent in general principles and practices with the objectives of H.R. 13777.

H.R.Rep. No. 94-1163, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin.News 6175, 6179.

The legislative history thus suggests two points: First, as the statutory mandate for § 202 plans was derived from BLM practice, there is every reason to suppose that pre-FLPMA plans, or at least many of them, would substantially correspond to the statutory requirement. Second, in view of that congruence, Congress is likely to have expected that the BLM would employ MFPs rather than, in every case, re-invent the wheel. The district court in fact acknowledged that the "MFP's [sic] may confirm [sic] to the general principles of the FLPMA," but then asserted that "they are not identical substitutes to RMP's [sic] [post-FLPMA plans developed in explicit effort to comply therewith]. The land use plans Congress envisioned would modify existing plans in several aspects, including public participation." J.A. at 153. Though obscure, the record

here suggests that the MFPs used to effect reclassifications did conform to the requirements of § 202, most particularly including public participation.

The Department of Interior has promulgated regulations allowing the BLM to rely on an MFP to terminate a classification only if the MFP meets criteria closely paralleling those of §202. Under 43 C.F.R. § 1610.8(a)(1) (1986), MFPs can support reclassifications only where they [1] "shall have been developed with public participation and government coordination. . . ." and [2] "shall be in compliance with the principle of multiple use and sustained yield." Assuming that Interior has adhered to this regulation (and there are no claims of non-adherence), the first criterion assures that none of the terminations here at issue can have violated § 202 in the single aspect specified by the district court as a potential discrepancy (and the feature most stressed by plaintiff). Moreover, the second criterion—planning in accordance with multiple use, sustained yield principles—is not only the first requirement of § 202(c), but is likely to entail compliance with the other features of its list, *e.g.*, protecting critical environmental areas, inventorying potential resources, considering present and potential uses, considering relative scarcity of the different values involved, and weighing long-term against short-term benefits. Thus the likelihood is very great that the relevant MFPs substantially comply with § 202.

Apart from the implications from 43 C.F.R. § 1610.8 (a)(1), the record is a complete blank. We do not know whether any of the plans fell short of other criteria in any significant respect—or in any insignificant one, for that matter. Not a single MFP was before the court. Not one is before us now. This is a novelty: adjudication in a vacuum. None of the judges in this proceeding—neither the district court, the majority, nor I—has any basis for

concluding that the MFPs relied on do not mirror RMPs in all substantive respects.

FLPMA and its context support the view that substantial compliance with § 202 should suffice for some time after enactment. Congress explicitly recognized that § 202 land use plans would not come into existence overnight; in a general provision on supervision of the public lands, it directed the Secretary to manage them pursuant to such plans "when they are available." 43 U.S.C. § 1732(a). Of course this general clause could co-exist with congressional insistence on 100% pure § 202 plans for classification decisions, but it surely counsels against finding a highly restrictive negative pregnant in § 202(d). A comparison of FLPMA with Congress's 1976 amendments to the Forest and Rangeland Renewable Resources Act of 1974, adopted the day after FLPMA, also militates against such an absolutist view. There Congress directed the Secretary of Agriculture to "attempt to complete" the upgrading of national forest planning by September 30, 1985. *See* 16 U.S.C. § 1604(c) (1982). Congress not only "knew how" to impose a deadline, as the saying goes, but when it did so in a parallel instance on almost the same day, it allowed nearly a decade and even at that required only an "attempt."

The district court recognized that the statute contemplated "temporary" reliance on MFPs, but concluded that the BLM had exceeded the limits of this tolerance. J.A. at 153.[4] Therefore it concluded that NWF was substantially likely to prevail on the merits of its claim. The district court did not explain its apparent belief that reliance on MFPs should become unlawful at some specific date—regardless of how closely the MFPs conformed to the substance of § 202.

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[4] The majority appears to repudiate that concession of the district court. Maj. at 321.

These considerations carry still worse implications for plaintiff when we turn to the issue of irreparable harm. Harm for such purposes is of course defined in terms of the evil that the particular statute was designed to prevent. Thus, in *Amoco Production Co. v. Village of Gambell*, __ U.S. __, 107 S.Ct. 1396, 1403, 94 L.Ed.2d 542 (1987), the defendants had neglected to hold certain hearings and to make certain findings. The Court (assuming the applicability of the requirements and their violation) held that an injunction was improper, in light of district court findings that the conduct enjoined would not adversely affect "subsistence uses" of land, the statutorily protected value. *Id.* at 1403-04. The court below, it observed, "erroneously focused on the statutory procedure rather than on the underlying substantive policy." *Id.* at 1403. *See also Weinberger v. Romero-Barcelo*, 456 U.S. at 314, 102 S.Ct. at 1804.

Here, even if we assume illegality under § 202, the district court had no basis for finding that such illegality would likely generate an adverse effect on the values implemented by § 202. That section manifests an intent that the public lands be managed in accordance with a planning approach that balances the many potential values to which they may be put and that allows public participation in that process. *See* note 3, *supra*. As the district court did not review a single MFP, plainly it was in no position to find that any fell materially short of fulfilling those purposes. What little we know suggests that there was no such shortfall. *Cf. Natural Resources Defense Council, Inc. v. Hodel*, 624 F.Supp. 1045 (D.Nev.1985) (reviewing and upholding MFP relied on by BLM after December 1982 for livestock grazing decision), *aff'd*, 819 F.2d 927 (9th Cir.1987). Moreover, it may well be that the bulk of the developmental activities restricted by the preliminary injunction would occur (if not blocked) on lands so barren

and so distant from areas of potential recreation that they could not jeopardize plaintiff's recreational interests.

Offsetting this doubtful threat to plaintiff's interests is the obvious effect on the absent holders of interests dependent upon the challenged terminations. For commercial interest holders, an investment is tied up for an indefinite period, all chance of any return denied. *Cf. First English Evangelical Lutheran Church v. County of Los Angeles,* __ U.S. __, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Further, and bizarrely, the preliminary injunction is now preventing land exchanges of such an obviously benign character that even *plaintiff* favors them. NWF sought to voluntarily dismiss its claim as to a tract slated for exchange by the Forest Service, under which it would give up interests already developed for vacation resort purposes and would secure the one remaining private inholding in an area proposed for Wild and Scenic River study status. *See* Excerpt of Record for a Writ of Prohibition ("E.R.") 180-84. The district court, however, hewed to its absolutist view of the law and denied relief. *See* E.R. 260. The preliminary injunction has also blocked a similar exchange between the Forest Service and the Trust for Public Land. *See* E.R. 175-79. At no point has the district court made any inquiry into the intersection of plaintiff's and the absentees' claims—*i.e.*, what areas of potential recreation are potentially threatened by the absentees' efforts to exercise their entitlements or to proceed with planned transactions.

Finally, the public interest does nothing to tilt the balance in favor of the injunction issued. Congress has manifested a deep interest in environmental concerns, but it has also shown an intention to allow reasonable development of mineral resources on the public lands. *See* 30 U.S.C. § 21(a) (1982) (it is the "continuing policy of the Federal Government . . . to foster and encourage private

enterprise in . . . the development of economically sound and stable domestic mining . . . [and] mineral reclamation industries, [and in] the orderly and economic development of domestic mineral resources . . . to help assure satisfaction of industrial, security and environmental needs"); 43 U.S.C. § 1701(a)(12) (1982) (announcing policy that "public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals"); *National Coal Association v. Hodel,* 825 F.2d 523, 529-30 & n. 8 (D.C.Cir.1987). Both interests are of great value; but in issuing the preliminary injunction the district court has made no effort to make marginal adjustments: to identify those areas where environmental interests are in real jeopardy from substantive administrative lapses from congressional mandated duties. The denial of relief even for exchanges favored by all parties appears to manifest a legalistic zeal quite inconsistent with the balancing that is required for preliminary injunctions.

Accordingly, there is no basis for the sweeping injunction here issued, halting all steps that the Secretary might take that depend on the challenged terminations.

B. ***Withdrawal Revocations***

Since the passage of FLPMA, the Secretary has issued 671 public land orders revoking withdrawals affecting nearly 20 million acres. J.A. at 61. NWF contends that these actions are illegal because the Secretary failed to provide the public an opportunity to participate in each withdrawal revocation, in violation of FLPMA § 309(e), 43 U.S.C. § 1739(e). That section provides:

> In exercising his authorities under this Act, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the

> public adequate notice and an opportunity to comment upon the formulation of standards and criteria and, to participate in, the preparation and execution of plans and programs for, and the management of, the public lands.

The district court found it likely that these limitations applied to the withdrawal revocations. J.A. at 155.

The Secretary argues that § 309(e) is intended to be precatory only, and in the alternative that it covers *planning* only.

The relation of § 309(e) to FLPMA as a whole lends some support to the Secretary's view of it as precatory. Section 309(e) is the last subsection of a section providing for the creation and use of citizen advisory counsils. That section is in turn the last provision in subchapter III, governing "Administration." At various points along the way, FLPMA provides explicitly for public participation. Thus, § 204(h) requires a public hearing for new withdrawals. § 204(*l*) requires, for a special class of revocations, an elaborate, multi-stage review by the President and Congress; beside the requirements of § 204(*l*), the references in § 309(e) to giving "the Federal government" notice and opportunity to comment appear rather pale. Finally, as noted above, § 202(f) requires public participation in the land-use planning process. The location in a general administrative provision, the generality of language, and the presence of specific mandates elsewhere make it at least plausible to suppose that Congress intended § 309(e) only as an exhortation.

It seems fair to regard § 309(e)'s character as at best ambiguous. Thus under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Secretary's reading of it as precatory is entitled to deference so long as it is a reasonable one. I believe it passes that test.

The defendants' alternative argument, limiting § 309(e) to planning activities, has some support in the legislative history,[3] but seems less plausible. Congress had, after all, explicitly required public participation in the planning process in § 202(f), so that renewal of the mandate in § 309(e) would be oddly duplicatory. In asserting the planning-only theory, however, the Secretary points to various mechanisms by which the public is brought into decisions *executing* the plans. Although the Secretary does not frame the argument as one of substantial compliance, his contentions inevitably suggest such a finding. If there is an opportunity for public participation in the BLM's exercises of *material discretion* down the line from planning, it is hard to classify its failure to provide automatically for public participation in withdrawal revocations as a material breach of § 309(e), even assuming it to be mandatory and to encompass individual "management" decisions.

Indeed, key decisions by which the government may shift title to private parties, or otherwise permit development activities, appear to be governed by regulations giving the public a role. The Secretary notes, for example, department regulations requiring the BLM to give public notice before making a land exchange, 43 C.F.R. § 2201.1 (a) (1986) (notice to be provided through the Federal Register and local newspapers, and to be sent directly to state and local officials, with a 45-day period for com-

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[3] Such history focuses generally on the value of public participation in planning, *see, e.g., One Third of the Nation's Land* 57 (Recommendation 11); H.R.Rep. No. 94-1163, 94th Cong., 2d Sess. 7 (1976), U.S.Code Cong. & Admin.News 1976, p. 6181 (commentary on draft section that emerged as § 202(f)); *but see* S.Rep. No. 94-583, 94th Cong., 1st Sess. 106-07 (1975) (correspondence arguably supporting application of § 309(e) to "management" decisions other than planning).

ment). *See also id.* § 2711.1-2 (1986) (similar, for sales); *id.* § 2802.4(d) & (e) (similar, for issuance of rights of way); *id.* § 2741.5(h) (similar, for grants under Recreation and Public Purposes Act, 43 U.S.C. § 869 *et seq.* (1982)).

The mining laws, however, particularly the Mining Act of 1872, 30 U.S.C. § 21 *et seq.* (1982), allow entry without BLM issuance of title. This might appear to create a gap. But regulations governing the environmental review process under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (1982), appear to close it up. § 5.4B(8), Appendix 5 to Chapter 6, Part 516 of Departmental Manual, appears by implication to require an environmental assessment ("EA") or environmental impact statement ("EIS") where termination or revocation would open lands to mining laws and the lands contain minerals of more than nominal value. 47 Fed.Reg. 50371 (Nov. 5, 1982); *see also* BLM Reply Brief at 17 (so construing § 5.4B(8)). *Cf. National Forest Preservation Group v. Butz,* 485 F.2d 408 (9th Cir.1973) (requiring a NEPA statement when the government enters an *exchange* under which private parties will acquire land on which they will engage in activities materially affecting the environment). Other regulations provide for public participation in the preparation of an EA or EIS. *See* 40 C.F.R. § 1501.4(b) (requiring involvement of the public "to the extent practicable" in preparing EAs); *id.* § 1503.1(a)(4) (providing for solicitation of public comment in preparation of an EIS). If the BLM follows these regulations as it construes them here, they assure public participation for precisely the withdrawal revocations that might jeopardize plaintiff's interests.

Moreover, even a nominal opening to entry under the mining laws preserves the department's opportunity to exercise discretion, together with a chance for the public to be heard. Departmental regulations require BLM approval

for any mining operations disturbing more than five acres, 43 C.F.R. § 3809.1-4, and the approval process requires an EA, *id.* § 3809.2-1. If the EA indicates that there is "substantial public interest" in the proposed plan, the officer in charge must arrange for public notice and consideration of public comments. *Id.* § 3809.2-1(c).

Again the record on these matters is completely deficient. Although it appears to be conceded that the revocations expose some lands in the vicinity of areas used by plaintiff's members to the risk of development, *see* pp. 329-330 *supra,* there is no evidence suggesting that want of public participation in withdrawal revocation procedures played any material role in creating this risk. If, for example, these revocations followed EAs or EISs under § 5.4B(8) of the Departmental Manual, public notice and opportunity to comment presumably occurred – unless the expected environmental effects were modest.[6]

As in the case of classification terminations, the leap to irreparable injury is an athletic one. If the withdrawal revocations that might lead to actual mining activity were made after public notice and opportunity to comment under § 5.4B(8) of the Departmental Manual, then want of public participation formally linked to § 309(e) would be irrelevant. Similarly, if (1) a revocation occurred without public opportunity for participation, but (2) later discretionary decisions triggered public notice and opportunity to comment, and (3) in those proceedings the fact of

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[6] It seems inescapable that § 309(e), even if mandatory, does not require public participation in *every* management decision. For example, the Secretary's regulations permit persons to engage in mining activities disturbing an aggregate of five acres of less (including access) per year merely on notice to the Secretary and without his approval. 43 C.F.R. § 3809.1-3 (1986). This excludes the public, but is surely permissible if public participation is not to be insisted upon simply as a fetish.

revocation did not materially reduce the range of real-world considerations that members of the public could invoke (*i.e.*, considerations other than the technical existence of the withdrawal itself), there would be no harm from the omission. *See Amoco Production Co. v. Village of Gambell,* 107 S.Ct. at 1403. But none of this is explored. Plaintiff has chosen to paint with a very broad brush, and the district court has accommodated its program. I would remand for examination of these issues.[7]

Finally, the interests of third parties and the public interest work against the preliminary injunction as they did in the classification context. The injunction bars absentees from exercise of their rights, for an indefinite period; it makes no effort to minimize the *aggregate* harm to the public interests in both environmental preservation and alternative activities: the district court has allowed environmental interests, however weak and however trivially

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[7] In addition, certain of the revocations were subject to § 204(*l*), which requires the Secretary to review specified withdrawals within 15 years of FLPMA's enactment and to submit to the President a report giving his recommendations as to whether they should be continued. The President is to forward the report to Congress, along with his recommendations. The Secretary is free to terminate withdrawals only when 90 days have passed without Congress having exercised a legislative veto. The procedure is now obviously questionable under *INS v. Chadha,* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), as is the status of the Secretary's authority assuming invalidation of the legislative veto. *See Alaska Airlines, Inc. v. Brock,* __ U.S. __, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987) (discussing the severability of statutes from their legislative veto provision). I would remand for consideration of NWF's claim that the Secretary disregarded the § 204 (*l*) process. Of course, my opinion on the claims under §§ 202(d) and 309(e) is only a dissent. Nonetheless, as the district court has not yet finally resolved the substantive claims, some attention to the § 204(*l*) claim may be in order in connection with that process if my reading of those sections has any merit.

they may be at risk as to particular tracts, to sweep the other interests off the board.

Though concurring on the finding of standing and satisfaction of Rule 19, I dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 86-5239

NATIONAL WILDLIFE FEDERATION

v.

ROBERT F. BURFORD, ET AL., APPELLANTS
MOUNTAIN STATES LEGAL FOUNDATION, ET AL.

No. 86-5240

NATIONAL WILDLIFE FEDERATION

v.

ROBERT F. BURFORD, ET AL., MOUNTAIN
STATES LEGAL FOUNDATION, ET AL., APPELLANTS

April 29, 1988

ON PETITIONS FOR REHEARING

Before MIKVA and WILLIAMS, Circuit Judges, and WEIGEL,* Senior District Judge, United States District Court for the Northern District of California.

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* Sitting by designation pursuant to 28 U.S.C. 294(d).

ORDER

PER CURIAM.

Upon consideration of the petitions for rehearing of the federal appellants and of Mountain States Legal Foundation it is

ORDERED, by the Court, that the petitions are denied, and it is

FURTHER ORDERED, by the Court, *sua sponte,* that the Clerk is directed to issue the mandate in these cases forthwith.

A memorandum of the Court is attached.

MEMORANDUM

PER CURIAM:

On December 4, 1985, the district court issued a preliminary injunction enjoining the Director of the Bureau of Land Management, the Secretary of the Interior, and the Department of the Interior from reclassifying or revoking restrictions on 180 million acres of public lands located in 17 states. The details of that injunction as well as the underlying litigation and the contentions of the parties have been summarized in the earlier opinion of this court upholding the district court injunction. See *National Wildlife Federation v. Burford,* 835 F.2d 305 (D.C.Cir.1987). Appellants filed petitions for rehearing and suggestions for rehearing *en banc,* which are currently pending before this court.

It has been over two years since the preliminary injunction was issued. As we stated in our opinion, "[t]his is a serious case with serious implications." 835 F.2d at 327. We noted then, and continue to believe, that some of the criticisms of the breadth and scope of the preliminary injunction offered in the vigorous dissent are not without

force. In addition, we are aware that the district court injunction has placed on "hold" for over two years a complex governmental effort to review and adjust its classifications of vast tracts of land. It is also beyond dispute that countless parties are affected by the uncertainties associated with the unsettled status of these lands. For these reasons, we believe that the disposition of these millions of acres should not continue to rest any longer than necessary on the foundation of a preliminary injunction which was entered on consideration of the brief affidavits and cursory materials presented to the court below.

While this case continues to pend in our court, the district court has not gone forward with plenary consideration of the merits. The court hereby denies the petitions for rehearing and issues its mandate forthwith with directions to the parties and the district court to proceed with this litigation with dispatch.

It is so ordered.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS

Dec. 4, 1985

MEMORANDUM OPINION

JOHN H. PRATT, District Judge.

Introduction

Plaintiff, an environmental organization, brought suit against the Director of the Bureau of Land Management, the Secretary of the Interior and the Department of the Interior to challenge the lifting of protective restrictions on certain federal lands. Plaintiff's cause of action arises under the Federal Land Policy and Management Act, the National Environmental Policy Act of 1969 and the Administrative Procedure Act. The case is now before us on a motion to intervene by Congressman John F. Seiberling, defendants' motion to dismiss and plaintiff's motion for a preliminary injunction.

Background

This litigation focuses on defendants' termination of protective classifications and revocation of withdrawals on approximately 170 million acres of public lands since 1981. The Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 *et seq.* (1982) (FLPMA), establishes comprehensive rules for the management of federal lands. The FLPMA includes two systems for preserving land in the public domain and thereby for protecting it from private ownership and development. "Classifications" allow the Department of the Interior to categorize lands according to their proper use. "Withdrawals" directly remove lands from private development and exploitation. Subject to certain procedural controls, the Secretary of the Interior may open land to private development by terminating the applicable classification or withdrawal. *See* 43 U.S.C. §§ 1712(d), 1714. Since the passage of the FLPMA in 1976, defendants have terminated classifications on 160.8 million acres of land, Parker Affidavit at ¶ 35, and revoked withdrawals for 20 million acres, Edwards Affidavit 1A at ¶ 25.

Plaintiff contends that in lifting these restrictions, defendants improperly ignored certain requirements of the FLPMA. Among plaintiff's claims are that defendants failed to review land status actions in the context of land use planning, to submit to the President and Congress withdrawal revocation recommendations, to promulgate rules and regulations governing withdrawal revocations, to provide for public participation, and to prepare environmental impact statements. Plaintiff ultimately seeks a declaration that defendants' land withdrawal program violates applicable law and regulations; an order both reinstating all withdrawals, classifications or other designations in effect on January 1, 1981[1] and enjoining defendants from taking any action inconsistent with these designations until they comply with their statutory obligations; and an order mandating that defendants rescind all directives, instructive memoranda, manuals or other documents regarding classification or withdrawal terminations until they have promulgated certain rules and regulations.

Plaintiff now moves for a preliminary injunction. The claim for relief here is more narrow than that in the Complaint. Specifically, plaintiff requests this court, *inter alia,* to enjoin defendants from modifying, terminating or altering any withdrawal, classification or other land use designation in effect on January 1, 1981,[2] and to enjoin them from taking any action inconsistent with the 1981 status quo. It "does not seek to invalidate existing mining claims or mineral leases nor does it seek to overturn completely sales or exchanges of previously withdrawn lands." Plaintiff's Reply Memorandum at 8-9.

In the meantime, defendants have moved to dismiss the entire action for failure to join indispensible [*sic*] parties, in particular the holders of mining claims and minerals leases on the disputed lands. They have also moved to dismiss Count II of the Amended Complaint, relating to failure to submit recommendations to the President and Congress, on the ground that the plaintiff lacks standing to raise this claim.

In addition to the motion for a preliminary injunction and motion to dismiss, we have before us a motion for

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[1] Although the figures in this case focus on events since 1976, it appears that most if not all of the contested terminations occurred since January 1, 1981.

[2] Plaintiff never revised the motion, which refers to October 21, 1976, the date mentioned in the original Complaint. We believe, however, in light of both the Amended Complaint and the argument at the hearing, that plaintiff intends to focus on the 1981 date.

intervention. Congressman John F. Seiberling, Chairman of the House Subcommittee on Public Lands, seeks to intervene in this action as a plaintiff. We will address these three motions in reverse order.

Discussion

I. *Motion for Intervention*

Congressman Seiberling's motion to intervene invokes Federal Rules of Civil Procedure 24. Because we find that Congressman Seiberling meets the requirements for permissive intervention under Rule 24(b), we do not need to reach the question of whether he also qualifies under subdivision (a).

Rule 24(b) allows intervention "upon timely application" by a person whose claim or defense shares with the main action a common question of law or fact. Although Congressman Seiberling moved to intervene three months after the complaint was filed, we decline to hold that his motion was untimely. To begin with, the amount of time elapsed since the complaint does not itself determine timeliness. *Natural Resources Defense Council v. Costle,* 561 F.2d 904, 907 (D.C.Cir.1977); *Hodgson v. United Mine Workers of America,* 473 F.2d 118, 129 (D.C.Cir.1972). Instead, we must look both to the purpose for which intervention is sought and to the improbability of prejudice to those already in the case. *NRDC v. Costle,* 561 F.2d at 907; *Hodgson,* 473 F.2d at 129. Although Congressman Seiberling seeks to intervene for the full course of the litigation, we can see no possible prejudice to defendants as a result of the timing of this motion.

Having satisfied the threshold requirement of timely application, Congressman Seiberling also meets the substantive criteria of Rule 24(b)(2). Congressman Seiberling alleges that defendants violated § 204(*l*) of the FLPMA,

43 U.S.C. § 1714(*l*), which requires submission to Congress of recommendations for land withdrawal revocations. Plaintiff raises the same claim in Count II of its Amended Complaint. As these identical allegations thus clearly show, the motion to intervene presents common questions of law or fact.[3]

Defendant attempts to block intervention by arguing that Congressman Seiberling lacks the necessary injury in fact for standing. We disagree. It is not necessary to prolong this discussion with citations that injury in fact is a key requirement of standing. *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 152, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970). If Congressman Seiberling was merely complaining that defendants have not faithfully executed the law, his claim, as a generalized grievance, would not constitute injury in fact. All citizens share his interest, *American Federation of Government Employees v. Pierce,* 697 F.2d 303, 305 (D.C.Cir.1982), and it is well settled that such "generalized grievances about the conduct of government" do not afford standing. *Flast v. Cohen,* 392 U.S. 83, 106, 88 S.Ct. 1942, 1956, 20 L.Ed.2d 947 (1968); *American Federation of Government Employees,* 697 F.2d at 305.

However, Congressman Seiberling is not seeking just to express a generalized grievance. He is suing to enforce his right as a Congressman to participate in withdrawal revocation decisions. Legislators have standing to challenge objective diminution of their influence in the legislative process. *See Harrington v. Bush,* 553 F.2d 190, 212 (D.C.Cir.1977); *Kennedy v. Sampson,* 511 F.2d 430, 434 (D.C.Cir.1975). In particular, executive action that nulli-

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[3] Since the § 204(*l*) claim satisfies the standard of Rule 24(b)(2), we do not need to address the issue of Congressman Seiberling's defense of the provision's constitutionality.

fies a specific congressional opportunity to vote constitutes injury in fact to individual Members of Congress. *See Goldwater v. Carter*, 617 F.2d 697, 702 (D.C.Cir. 1979), *vacated on other grounds*, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979).

In the present case, the FLPMA requires the President to transmit to the President of the Senate and the Speaker of the House the Secretary's recommendations for withdrawal revocations. The statute further authorizes a concurrent congressional resolution that the recommendations should not be implemented.[4] Defendants' bypassing of the congressional review process thus denied to Congressman Seiberling the potential opportunity to approve or reject proposals to terminate specific land withdrawals. This diminution of Congressman Seiberling's authority caused injury in fact and thus guarantees his "personal stake in the outcome of the controversy." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).[5]

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[4] As the government defendants note in their opposition to the preliminary injunction, this provision for concurrent resolution may be unconstitutional after *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). However, defendants do not request a ruling on its constitutionality, *see* Opposition to Motion to Intervene at 6, and we do not express an opinion on the issue. As long as this provision remains in the statute, the FLPMA promises to every Member of Congress the opportunity to vote on the Secretary's recommendations. It is of no concern that there is no ongoing legislative process, as Mountain States emphasizes. Mountain States Opposition at 11 n. 11. Here, defendants' failure to submit recommendations to Congress precluded such a process from even commencing. Congress had nothing to review.

[5] We reject defendants' suggestion that Congressman Seiberling cannot assert the interest of Congress in the absence of a congressional resolution authorizing such representation. Where a Member of Congress is not appointed to sue, he must demonstrate personal injury, *Harrington*, 553 F.2d at 199-200 n. 41. However, he can do so in-

Congressman Seiberling also fulfills the causation and redressability criteria for standing. A plaintiff must not only demonstrate injury in fact, but also show both that the injury can be traced directly to defendant's action. *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556 (1984); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925-26, 48 L.Ed.2d 450 (1976), and that the relief he requests will redress the injury. *Id.* at 38, 96 S.Ct. at 1924. Mountain States Legal Foundation argues that because the statute channels the Secretary's recommendations through the President, Congressman Seiberling cannot satisfy either requirement. We reach a different conclusion. The statute allows the President no discretion. He *must* transmit to Congress the recommendations he receives. As a mere conduit for the Secretary's recommendations, the President does not interrupt the causal connection between defendants' actions and the lack of any reporting to Congress. Similarly, if defendants are ordered to report to the President, the mere implication that the President might withhold information from Congress and thus violate the express terms of the FLPMA does not threaten redress enough to interfere with standing.

Accordingly, we grant the motion to intervene.

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directly by showing (1) injury in fact to Congress and (2) injury to himself, as an individual legislator, because of the harm done to the institution. *Id.* Here, Congress' exclusion from the withdrawal revocation process constitutes injury to Congress. Because of this exclusion, Congressman Seiberling lost a concrete opportunity to exercise his voting authority as a Member of Congress. The fact that he was also Chairman of the Subcommittee on Public Lands does not diminish his standing as an individual legislator. *See National Wildlife Federation v. Watt*, 571 F.Supp. 1145, 1147 (D.D.C.1983) (recognizing standing of Congressman Udall "as a Congressman and as a Committee Chairman").

II. *Motion to Dismiss*

A. *Failure to Join Indispensible [sic] Parties*

While the holders of mining claims and mineral leases are necessary parties, their absence does not compel dismissal. Defendants assert that plaintiff should have joined as defendants all third parties who hold mining claims or mineral leases to the lands at issue. Federal Rule of Civil Procedure 19 requires a two-step analysis for such compulsory joinder claims. First, the court must determine if the absent party falls within the category of persons "to be joined if feasible." Second, the court must determine whether, in equity and good conscience, the case should proceed without the third party or be dismissed. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108-09, 88 S.Ct. 733, 737-38, 19 L.Ed.2d 936 (1968); *Defenders of Wildlife v. Andrus*, 77 F.R.D. 448, 451 (D.D.C.1978).

The mining claimants and lessees meet the first requirement of compulsory joinder, as set out in Rule 19(a). They all claim an interest in the lands that are the subject of this action. *See* Rule 19(a)(2). In the case of the mining claimants, this interest may even amount to exclusive possession and enjoyment. 30 U.S.C. § 26 (1982).

Furthermore, disposition of the action in their absence could impair or impede the ability of these parties to protect their interests. *See* Rule 19(a)(2)(i). If plaintiff's injunction is granted, such relief could suspend development of the third parties' interests. Until as late as 1991, defendants would be unable to issue patents, approve lease activities—in short, to authorize any commercial activity on these lands. Furthermore, if Congress rejects the Secretary's recommendations to revoke the withdrawals, those parties who now hold mining claims or mineral leases could lose their interest altogether. The fact that plaintiff

does not directly seek to void these interests is irrelevant. What matters is the effect of ultimate disposition of the case.

The third parties here could suffer harm not just by disposition of the action but by disposition in their absence. To be sure, the present defendants share the interest of these parties in resisting plaintiff's proposed injunction. In fact, the intervention by the Mountain States Legal Foundation, which represents a group of mining and milling lessees, ensures advocacy of at least some of the third parties' claims. However, only the absent parties can accurately measure the full value of the interests that they now hold and the extent to which that value could be impaired or lessened. Their absence weakens defendants' ability precisely to articulate the harm that plaintiff's requested relief would cause. In sum, it cannot be denied that these holders of mining claims and leases have legitimate interests.

Our finding that the mining claimants and lessees are necessary parties under Rule 19(a), however, does not end the inquiry. In determining whether or not to dismiss, we must consider and weigh (1) the extent of potential prejudice to these parties, (2) the possibility of avoiding this prejudice by shaping alternative measures of relief, (3) the adequacy of judgment in these parties' absence, and (4) the adequacy of plaintiff's remedy if we dismiss. Balancing these factors, we conclude that the action may proceed without the mining claimants and lessees. Our reasoning may be summed up in the discussion which follows.

The fact that dismissal of plaintiff's claims for relief in this court would effectively foreclose plaintiff from relief elsewhere outweighs the more speculative harm to the absent parties. As we discussed, *supra*, plaintiff's proposed injunction would suspend development of and, depending on plaintiff's success in obtaining permanent relief, could

possibly revoke existing claims or leases. Thus, if the case proceeds without the presence of the claimants or lessees, these third parties would suffer temporary hardship; the possibility of permanent harm, however, is only a matter of speculation.

In contrast, dismissal for failure to join would deny plaintiff an adequate forum in which ever to prosecute its claim. The availability of an alternative forum represents a "critical consideration" in deciding joinder questions. *Pasco International (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 500 (7th Cir.1980). The lands involved in this case lie in seventeen different states. The absent parties probably cover an even broader geographical range. Because of problems of jurisdiction and venue, plaintiff could never join all defendants in one forum. Requiring it to bring seventeen separate lawsuits or even to combine actions through the device of multidistrict litigation would create enormous administrative disorder and delay. Dismissal, therefore, would effectively discourage and, for all practical purposes, put an end to this litigation. Balanced against the merely temporary or speculative harm to the absentees, this harsh result supports denial of the defendants' motion to dismiss.

The two other factors listed in Rule 19(b) do not influence our determination. If, as plaintiff contends, defendants have illegally terminated classifications and withdrawals, it may well be necessary to grant the injunction requested. Any lesser relief that sought to provide protection for the interest of third parties would have the effect of permitting defendants' actions to continue without further challenge. The third factor—adequacy of judgment in the third parties' absence—also does not enter into our decision, since their presence is not essential to shape the judgment.

The "public rights" exception provides further support for denial of the motion to dismiss. This doctrine derives from the teaching of *National Licorice Co. v. NLRB*, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799 (1940), where the Supreme Court held that the NLRB could order an employer not to enforce certain illegal contracts with its employees, even though the employees, who had a vital interest in the matter, had not been joined. As the Court reasoned, "[i]n a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Id.* at 363, 60 S.Ct. at 577. Here, as in *National Licorice*, the plaintiff's cause of action is grounded in the assertion of public rather than private rights. The public's interest in disposition of federal lands and, more concretely, in participating in the management of these lands is a matter of transcending importance. It extends this case far beyond the boundaries of private dispute.

The specific facts of *National Licorice* do not limit the "public rights" exception to cases where the absentees' interest is being advanced. Subsequent courts have applied the exception even where disposition could harm the absent parties. *See, e.g., Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919 (11th Cir.1982), *cert. denied*, 459 U.S. 971, 103 S.Ct. 302, 74 L.Ed.2d 283 (1982); *Swomley v. Watt*, 526 F.Supp. 1271 (D.D.C.1981); *Natural Resources Defense Council, Inc. v. Berklund*, 458 F.Supp. 925 (D.D.C.1978), *aff'd per curiam*, 609 F.2d 553 (D.C.Cir.1979).

The policy behind the "public rights" exception emphasizes the need to permit plaintiff to proceed without joining the mining claimants and lessees. As Judge June Green noted in *NRDC v. Berklund*, 458 F.Supp. 925, the "public rights" exception serves to remove joinder as an obstacle

that might otherwise preclude litigation against the government. *Id.* at 933. Because plaintiff lacks an alternative forum, requiring joinder of all parties could foreclose forever a legitimate cause of action against the government. We cannot sanction such a Draconian result. We therefore have no difficulty in denying the motion to dismiss for failure to join indispensible [*sic*] parties.

B. *Lack of Standing on Count II*

Defendants argue that plaintiff National Wildlife Federation lacks standing on Count II of its Amended Complaint, the claim that defendants violated the FLPMA by failing to submit recommendations to the President and Congress. As well indicated at the hearing, National Wildlife Federation might lack standing if it stood alone. However, this issue has become moot because we have permitted Congressman Seiberling to intervene as a plaintiff. As we discussed above, Congressman Seiberling has standing. His standing is sufficient to shield Count II from defendant's motion to dismiss. Where one plaintiff has standing, we do not need to consider the standing of other plaintiffs. *See, e.g., Watt v. Energy Action Educational Foundation,* 454 U.S. 151, 160, 102 S.Ct. 205, 212, 70 L.Ed.2d 309 (1981). Accordingly, we deny defendants' motion to dismiss Count II for lack of standing.

III. *Motion for a Preliminary Injunction*

In ruling on plaintiff's motion for a preliminary injunction, it is well settled that we must consider certain established criteria, *i.e.,* (1) the likelihood of plaintiff's success on the merits (2) the prospect of irreparable injury in the absence of relief (3) the potential harm to other interested parties, and (4) the public interest. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.,* 559 F.2d 841, 842-43 (D.C.Cir.1977). After weighing these factors, it is our judgment that a preliminary injunction should issue.

A. *Likelihood of Success on the Merits*

1. *Failure to Review Land Status Actions in the Context of Land Use Planning*

In considering the likelihood of success on the merits of plaintiff's several claims, we consider only two of the more important. The first is plaintiff's claim that defendants improperly terminated land classifications without first preparing Resource Management Plans. We hold that there is a likelihood that plaintiff will succeed on the merits.

Section 202 of the FLPMA, concerning classifications, directs the Secretary of the Interior to develop "land use plans," which establish the use of the public lands. 43 U.S.C. § 1712(a). Subsection (d) further provides:

> Any classification of public lands or any land use plan in effect on October 21, 1976, is subject to review in the land use planning process conducted under this section, and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The Secretary may *modify or terminate any such classification consistent with such land use plan.*

42 U.S.C. § 1712(d) (emphasis supplied). Since 1976, defendants have terminated classifications affecting approximately 160 million acres of land. Yet, as plaintiff alleges and defendants do not deny, defendants have completed only a fraction of the land use plans for these areas. Thus, the vast majority of classification terminations have occurred outside the context of land use planning.

Defendants' reliance on "Management Framework Plans" (MFP's) is misplaced and does not satisfy the statutory expectations of "land use plans." As section 202(a) evidences, Congress sought a comprehensive system of land use plans. In its regulations, the Interior Department identifies these land use plans as "Resource Management Plans" (RMP's). 43 C.F.R. § 1601.0-5(k) (1984). It is true that Congress did not reject altogether existing MFP's. It recognized that RMP's would not be ready immediately, *see* 43 U.S.C. § 1732(a) (referring to land use plans "when they are available"), and it noted that BLM's pre-FLPMA system of land planning was consistent in general principles and practices with the objectives of the Act. H. Rep. No. 1163, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 6175, 6179.

However, looking at the matter in its totality, it is clear to us that Congress approved only temporary reliance on MFP's. It never authorized the vast scale of classification terminations without land use plans which we see today, more than nine years after the passage in 1976 of the FLPMA. MFP's may confirm to the general principles of the FLPMA, but they are not identicai substitutes to RMP's. The land use plans Congress envisioned would modify existing plans in several aspects, including public participation. By terminating classifications for 160 million acres of land outside the context of land use planning, defendants have simply evaded the statute's directive that land use plans "shail be developed" and that the Secretary terminate classifications "consistent with such land use plans."

Defendants' obligation to review land status actions in the context of land use planning, however, does not extend beyond classification terminations. Plaintiff reads section 202(d) also to apply to withdrawal revocations, and it argues that defendants' failure to tie withdrawal revocations to land use planning thus violates the FLPMA. We disagree with plaintiff's reading of the statute. Classification terminations and withdrawal revocations are separate and distinct. Section 202(d) links land use planning to classification terminations. It never mentions withdrawal revocations, which appear in a separate section of the statute. *See* 43 U.S.C. § 1714. The history of classifications and withdrawals further contradicts plaintiff's equation of the two procedures. Classifications derive from the Classification and Multiple Use Act of 1964, Pub.L. No. 88-607, 78 Stat. 986, which expired in 1970. Withdrawals, on the other hand, date back to the nineteenth century and were executed by the Secretary largely without statutory guidance. Having developed along distinct paths, classification terminations and withdrawal revocations do not now merge in section 202(d), particularly since the statute separates the two terms. Therefore, plaintiff's likely success on its first claim applies only to defendants' terminations of land classifications.

2. *Lack of Public Participation*

Despite the statutory command, defendants have failed to provide for public participation in their withdrawal revocation decisions. Section 309(e) of the Act, 43 U.S.C. § 1739(e), requires the Secretary to establish procedures to give the public an opportunity "to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, *and the management of,* the public lands" (emphasis supplied). Defendants apparently have not permitted public input into their decisions to revoke land withdrawals. This lack of public participation both violates the text of the statute and frustrates Congress' intent that "[p]lanning decisions are to be made only after full oppor-

tunity for public involvement in the planning process." H. Rep. No. 1163 at 2, U.S.Code Cong. & Admin.News 1976, p. 6176. Defendants protest that they offer numerous avenues for public participation in land use planning. Yet the statute calls for participation also in the "management" of public lands. Withdrawal revocations fall into this "management" category. We find, therefore, that plaintiff is likely to succeed on this claim.

If plaintiff ultimately prevails on the two counts discussed, it could obtain the permanent injunction it seeks. Thus, in light of our conclusion that plaintiff will likely succeed on these counts, we do not need to reach the merits of plaintiff's other claims, including its claim that defendants failed to submit withdrawal recommendations to the President and the Congress as required by § 204(*l*) of the Act.

B. ***Irreparable Injury***

We have no problem in holding that defendants' actions in lifting protective land restrictions will irreparably injure plaintiff's members unless enjoined. In ordering classification terminations and withdrawal revocations, defendants removed the only absolute shield against private exploitation of these federal lands. It is true, as defendants contend, that the classification terminations and withdrawal revocations do not immediately open the lands to mining and mineral leasing. They merely trigger the operation of certain discretionary land laws. Yet, as defendants also concede, some of the backup safeguards are optional. For example, the Secretary may choose whether or not to prepare an environmental impact assessment or statement. Transcript of September 16 Hearing at 54, 58. Moreover, neither the statutes nor the regulations can prohibit all development: they can only regulate its process.

If defendants have improperly terminated classifications or withdrawals to begin with, *any* allowance of mining or leasing can cause irreparable harm. Such activity can permanently destroy wildlife habitat, air and water quality, natural beauty and other environmental values. Defendants' suggestion that plaintiff's members can still hike, fish and otherwise enjoy these lands ignores both aesthetic interests and the process whereby a holder of a mining claim can gain the right to exclusive possession. Similarly, defendants' calculations limiting the acres that have actually been leased or mined[6] demonstrates nothing about the future impact of their actions. Without the preliminary injunction, defendants' termination of classifications and withdrawals could lead to the permanent loss of lands to public use and enjoyment—an injury we feel would be irreparable.

C. ***Harm to Interested Parties***

While we acknowledge that the preliminary injunction would harm third parties, we do not view this injury as so serious as to outweigh the other factors supporting the injunction. The preliminary injunction would bar present holders of mining claims and mineral leases from developing their interests. To the extent they have made investments in obtaining their claims or leases or in beginning development, the delay in their investment return would represent financial injury. However, the preliminary injunction alone would not sever these parties' interests. If defendants prevail on the merits, it would only delay their realization. Furthermore, the injunction is not likely to reduce the ultimate value of the ore to be mined.

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[6] Defendants claim that only 845 acres are being mined. *See* Hearing Transcript at 55. As the discussion of harm to private parties indicates, this is an axe that cuts both ways.

D. *The Public Interest*

The public interest clearly favors granting the preliminary injunction. In section 102 of the FLPMA, Congress declared "it is the policy of the United States that – (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest." 43 U.S.C. § 1701(a)(1). This statement of policy, which provides the basis for plaintiff's claims for relief, underscores the public interest in ensuring orderly procedures for removing certain federal controls over government-owned lands. If defendants have violated the FLPMA in the process of terminating classifications and revoking withdrawals, the preliminary injunction will protect against further illegal actions pending resolution of the merits.

Furthermore, the preliminary injunction would serve the public by protecting the environment from any threat of permanent damage. Defendants' scenario of administrative havoc invokes a limited version of the public interest. While granting the preliminary injunction would inconvenience defendants and those parties holding specific interests in the lands at issue, denying the motion could ruin some of the country's great environmental resources – and not just for now but for generations to come.

For these reasons, we grant the plaintiff's motion for a preliminary injunction.

Orders consistent with the foregoing have been entered this day.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS

Feb. 10, 1986

MEMORANDUM OPINION

JOHN H. PRATT, District Judge.

Plaintiff National Wildlife Federation (NWF) has sued the Director of the Bureau of Land Management, the Secretary of the Interior and the Department of the Interior to achieve, *inter alia,* reinstatement of all land classifications and withdrawals in effect on January 1, 1981 until defendants take certain actions that plaintiff claims are required by law. This opinion addresses several pending motions.

Background

On December 4, 1985 we granted a preliminary injunction. The order included a prohibition against defendants' modifying, terminating, or altering any withdrawal, classi-

fication or other designation governing protection of the lands in the public domain that was in effect on January 1, 1981 or taking any action inconsistent with such withdrawals, classifications or other designations. It also enjoined all persons holding interests in the lands at issue from taking any action inconsistent with the present status of the lands.

Since our order of December 4, 1985, the parties have filed several motions. The federal defendants asked us to amend, reconsider and clarify the order. Defendant-intervenor Mountain States Legal Foundation (Mountain States) also moved for reconsideration and, in addition, for either reconsideration of our order denying its earlier motion to dismiss or, in the alternative, certification of the joinder issue to the Court of Appeals. Finally, plaintiff moved to consolidate a hearing on defendants' motions with a hearing on the merits.

We issued a stay of our preliminary injunction on December 16, 1985. On January 6, 1986, we heard arguments on defendants' motions. At the hearing, the federal defendants submitted a proposed order similar to plaintiff's suggested revision. We then asked the parties to confer and attempt to agree on a draft order. Plaintiff and the federal defendants now offer such an order but disagree on the interpretation of one of its provisions. Mountain States does not join in presenting this order but renews its earlier objections to the issuance of any injunction. We will discuss the various motions pending as well as detail our intention with respect to certain provisions of the new order.

Discussion

1. *Motions for Reconsideration*

At the outset we deny the federal defendants' request for reconsideration of our issuance of the preliminary injunction. They offer no new points in opposition, and we continue to adhere to our reasoning as set out in the December 4, 1985 Memorandum Opinion. Mountain States, on the other hand, does introduce several new arguments, which we will now address separately.

A. *Lack of Injury to Plaintiff*

Mountain States claims that since the lands at issue were subject to certain commercial exploitation even before defendants' classification terminations and withdrawal revocations, NWF can prove no injury.[1] It contends, in essence, that once commercial development was authorized, there could be no further injury to the environmental and aesthetic interests of plaintiff's members. This generalization sweeps too broadly. It fails to distinguish among types of commercial development. The fact that land was previously open to activities such as "dam construction, airports, hydroelectric power sites, and military reservations and target ranges," Mtn. States Reply at 3, hardly eliminates injury when the land is later made available for strip mining. Similarly, there is injury to plaintiff's members ability to use land, once open only to mineral leasing, that becomes subject, through operation of the mining laws, to fee interest transfer. Mountain States has not shown that the prior commercial uses of the lands are identical to those allowed since the withdrawals were revoked and the classifications terminated. We con-

[1] This contention, while challenging our jurisdiction to grant equitable relief, raises the issue of plaintiff's standing to sue.

tinue to find irreparable injury to plaintiff and reaffirm plaintiff's standing to bring this action.

B. ***Exhaustion***

Mountain States also raises, for the first time, a claim that this court may not review plaintiff's claims since NWF has not exhausted its administrative remedies. Mountain States concedes that the withdrawal decisions represent final agency actions. Reply at 8 n. 5. Thus, its exhaustion argument can focus only on the classification terminations.

Neither the Federal Land Policy and Management Act, 13 U.S.C. §§ 1701, *et seq.* (FLPMA), nor the applicable regulations foreclose this court's review of defendants' actions. The statute itself imposes no exhaustion requirement,[2] and in fact emphasizes Congress' desire to provide for judicial review of public land adjudication decisions. 43 U.S.C. § 1701(a)(6). Similarly, the regulations appear to vest a right of appeals only in an individual "party" to a discrete classification termination case. 43 C.F.R. § 4.410(a) (1984). NWF was not a "party" to any of defendants' termination decisions.

Mountain States argues that the regulations pertaining specifically to land classifications establish a right—and a duty—to seek administrative review. The regulations provide that classifications may be "changed" using specified procedures, 43 C.F.R. § 2461.4, which include a sixty-day delay after publication of the proposed classification, § 2461.2, and a thirty-day period after final publication for administrative review. § 2461.3. However, the pro-

[2] Mountain States alleges that 43 U.S.C. § 1704 mandates application of the review mechanism of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* Reply at 10. We have read Title 43 but do not find a § 1704.

cedures of Subpart 2461 relate only to the process of classifying public lands. They do not appear to address actions *terminating* such classifications. We do not share Mountain States' confidence that "changing" classifications necessarily includes terminating them. Furthermore, the government never published its proposed decisions, as required by 43 C.F.R. § 2461.2. Pl.Opp. to Mtn. States Motion at 7. It would be anomalous to impose a rigid exhaustion requirement on plaintiff where defendants have not followed or attempted to follow their own procedures.[3]

We note further that mere publication in the *Federal Register* may not alert even the most careful reader that defendants' classification terminations should inspire protest. As plaintiff noted earlier, the notices in the *Federal Register* do not indicate "whether environmental impact statements were prepared, whether land use plans supported the action, or whether the action had been sent to the President and Congress for review." Pl. Reply to Def. Opp. to Pl. Motion for Prelim. Inj. at 13. Unlike most challenges to agency action, plaintiff's complaint raises concerns which the agency's notice, on its face, may not have triggered or aroused.

Even if the regulations normally require adminstrative review, we do not feel that in the factual context of this case any exhaustion rule limits our jurisdiction. Exhaustion is a flexible requirement, one tailored to "an understanding of its purposes and of the particular administrative scheme involved." *McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 1662, 23 L.Ed.2d 194 (1969); *accord Etelson v. Office of Personnel Management*, 684

[3] This failure to publish proposed termination actions also undermines Mountain States' reliance on 43 C.F.R. §§ 4.450 and 2450.4(a), since both sections assume that action has first been "proposed."

F.2d 918, 923 (D.C.Cir.1982). As the Supreme Court has observed, the requirement of exhaustion allows the agency the opportunity to make a factual record, to exercise its discretion or to apply its expertise. It permits the agency to discover and correct its own errors. It prevents deliberate flouting of administrative processes. Finally, it avoids the necessity of premature judicial intervention. *McKart,* 395 U.S. at 194-95, 89 S.Ct. at 1662-63.

None of the underlying purposes of exhaustion apply here. The essence of plaintiff's claim is legal: the exercise of agency discretion and expertise and the development of a factual record would not be helpful or necessary to decide this legal issue. Plaintiff's unsuccessful attempts earlier to encourage defendants to reverse their present policies, the government's commitment to these policies as revealed in its vigorous defense, and the magnitude of decisions involved all indicate the futility of further administrative efforts and the inevitability of recourse to the courts. Finally, plaintiff's attempts to present its claims to the government through various means, Pl. Opp. at 8, demonstrate that while plaintiff did not seek full-scale administrative review, it did not "flout" the administrative process.

Thus finding that plaintiff need not have pursued administrative review and that an exhaustion prerequisite would serve no benefit here, we hold that plaintiff may seek judicial review.

C. *Certification of the Joinder Question Under 28 U.S.C.*

Mountain States urges us either to reconsider our denial of its motion to dismiss for failure to join indispensible [*sic*] parties or to certify the issue to the Court of Appeals under 28 U.S.C. § 1292(b). We recognize Mountain

States' legitimate concern for the interests of the absent parties. However, we see no reason to reverse our original ruling. The effective result of preventing plaintiff from litigating its claims were we to require joinder and the "public rights" exception to normal joinder rules combine to reinforce our holding that the absent parties are not "indispensible [*sic*]."

Further, we decline to certify the issue under § 1292(b). The statute permits certification when, on issuing an order, the district judge "shall be of the opinion that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." To begin with, we do not believe there is "substantial ground for difference of opinion" with our conclusion that joinder here is unnecessary. This case clearly fits the doctrine of the "public rights" exception, as established by the Supreme Court in *National Licorice Co. v. NLRB,* 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed.799 (1940), and developed in subsequent cases. Contrary to Mountain States' assertion, the potential adverse effect on the absent parties does not reflect a novel application of the doctrine. *See, e.g., Jeffries v. Georgia Residential Finance Authority,* 678 F.2d 919 (11th Cir.1982), *cert. denied,* 459 U.S. 971, 103 S.Ct. 302, 74 L.Ed.2d 283 (1982); *Swomley v. Watt,* 526 F.Supp. 1271 (D.D.C.1981); *Natural Resources Defense Council v. Berklund,* 458 F.Supp. 925 (D.D.C.1978), *aff'd,* 609 F.2d 553 (D.C.Cir.1979).

Mountain States argues that the "public rights" exception does not justify nonjoinder where plaintiff's requested relief would not just harm but would "invalidate the property rights" of the absent parties. Memo. in Support of Motion for Reconsideration at 30. Plaintiff, however, does not request direct cancellation of any property

rights. It seeks compliance with certain statutes and regulations. Other courts have applied the "public rights" exception where a plaintiff seeks similar compliance with the law, even though the immediate effect of plaintiff's request would be harm to third parties. *See NRDC v. Berklund,* 458 F.Supp. 925[4]; *State of Delaware v. Bender,* 370 F.Supp. 1193 (D.Del.1974).

This case typifies a "public rights" proceeding. Plaintiff seeks to protect and enforce the public's right to full compliance with the laws governing management of the public lands. The fact that Mountain States claims also to represent an alternative public interest does not weaken the force of the "public rights" doctrine in this case. *See Sierra Club v. Watt,* 608 F.Supp. 305, 325 (E.D.Cal.1985) (opponents of public interest plaintiffs included a public interest group with a viewpoint different from the plaintiffs'). In *Sierra Club,* several environmental organizations and the State of California challenged, *inter alia,* the Secretary of the Interior's exclusion of lands less than 5,000 acres from wilderness study area status. In holding that the "public interest" exception justified nonjoinder of the owners of mineral rights in those lands, the court concluded "[w]hatever the outer boundaries of the public interest exception, the instant case falls within the heart of it." 608 F.Supp. at 325. We believe that the facts of this

[4] Mountain States attempts to distinguish *NRDC v. Berklund* on the ground that the relief eventually *provided* merely delayed the issuance of coal leases. Yet in discussing the joinder problem earlier in the opinion, Judge Green gave no indication that she was not considering the full relief plaintiff there sought, which included enjoining defendants from issuing the leases without recognizing the Secretary's discretion to reject lease applications on environmental grounds and without preparing an environmental impact statement.

case parallel those of *Sierra Club* and that this case also "falls within the heart" of the "public interest" exception.[5]

Furthermore, an immediate appeal of the joinder issue is not likely to "materially advance the ultimate termination of the litigation." Today we reissue the preliminary injunction. Plaintiff, through its motion to consolidate, has evidenced its readiness to proceed to the permanent injunction proceeding. While defendants oppose this motion, we do not believe that final adjudication in this court represents a distant hope. An interlocutory appeal to the Court of Appeals, whose own over-loaded docket precludes early resolution, would not "materially" advance termination of this case.

Having denied both motions for reconsideration of the preliminary injunction, we now turn to the order itself.

II. *Preliminary Injunction Order*

The preliminary injunction order accompanies this opinion. We here highlight certain aspects of that order.

First, the preliminary injunction order enjoins only the federal defendants. Third parties are not subject to its prohibitions.

Second, we do not intend by this order to overturn or in any way to upset fee interests. Parties, such as Summit County School District, we understand, which have fee interests in the lands at issue in this case are not affected by the preliminary injunction.

[5] *Naartex Consulting Corp. v. Watt,* 722 F.2d 779 (D.C.Cir.1983), cited by Mountain States, sheds no light on the present case. In *Naartex,* the plaintiff was seeking directly to cancel a contract involving the absent parties. Furthermore, it was suing on behalf of its own interests in obtaining the contract; it did not raise the issue of the public interest.

Third, while the order specifically protects state selection and conveyance rights of the State of Alaska, the conveyance rights of Alaska natives, the continued construction of the All American Pipeline, and transactions or activity by Summit County School District [*sic*]. These are limited exclusions. Other third parties are not encouraged to seek exemption. We believe that Alaska, All American and the School District would be able to continue with their present plans regardless of the provisions in the order that mention them. In other words, these parties are already exempted under the general terms of the order. We name them merely out of an abundance of caution to emphasize that the injunction does not affect them.

Fourth, paragraph 3(a) refers to filing required to be made by holders of existing mining claims in order to preserve their claims. *See* 43 C.F.R. § 3833.2-1. It does not permit defendants to authorize mining activity.

Finally, the injunction prohibits the federal defendants from taking any action inconsistent with the specific restrictions of the withdrawals and classifications in effect on January 1, 1981. Thus, activities that would have been permitted on the affected public lands under the previous withdrawals or classifications prior to revocation or termination, may still take place.

The parties focus on this issue with respect to lands classified for multiple use management under the Classification and Multiple Use Act of 1964 (CMUA), 78 Stat. 986 (1964). In particular, they disagree over whether such lands would nonetheless be subject to "disposal." The CMUA required the Secretary of the Interior to classify the public lands for either "disposal" or "multiple use management." Although the Act expired in 1970, the savings provision in the FLPMA extended all existing classifications "until modified under the provisions of this Act, or other applicable laws." 43 U.S.C. § 1701. In challenging classification terminations, plaintiff ultimately seeks to reinstate prior classifications, developed pursuant to the CMUA, until defendants comply with their statutory obligations. Thus, the parties' dispute necessitates analysis of the classification scheme that the CMUA established.

We agree with plaintiff that the statute itself does not contemplate *disposals* of land when classified for multiple use management. The CMUA equates management for multiple use with *retention*. It commands the Secretary to decide "which lands shall be classified for disposal and which lands he considers to contain such values as to make them more suitable for retention in Federal ownership for interim management. . . ." 78 Stat. 986, § 1(b). The legislative history confirms this dichotomy between classifications for disposal on the one hand and classifications for retention under principles of multiple use management on the other. *See* S.Rep. No. 1506, 88th Cong., 2d Sess. at 2, *reprinted in* 1964 U.S. Code Cong. & Ad. News 3755, 3756 (Secretary to classify public lands "into at least two broad groups: those subject to disposal and those subject to retention").

In arguing that § 7 of the statute weakens this dichotomy, defendants read too much into the phrase "in accordance with this Act." We disagree that § 7 "obviously" allows the Secretary still to dispose of lands regardless of their classification. We read this provision as merely emphasizing that once the Secretary has classified lands for disposal "in accordance with this Act," nothing in the statute further hampers his power to effectuate the disposals.

By way of further elaboration, the applicable regulations on their face do not contradict the statutory distinction between retention for multiple use management and disposal. To begin with, the regulations also link multiple use management classifications with retention. *See e.g.*, 43

C.F.R. § 2400.0-2 ("retention and management"); § 2400.0-3(j) ("(1) sold . . . or (2) retained, at least for the time being, in Federal ownership and managed. . . ."); § 2429.2 ("Lands may be classified for retention . . . if they are not suitable for disposal. . . ."). Furthermore, the segregation provisions can be read to harmonize with this two-part framework. Defendants stress the provision keeping open classified public lands to "as many forms of disposal as possible consistent with the purposes of the classification and the resource values of the land." 43 C.F.R. § 2440.2. Defendants suggest that land classified for multiple use management need not be segregated from all forms of disposal and that disposal is proper under such a classification.

This argument, which we suspect reflects much of plaintiff's concern, assumes that "disposal" is necessarily inconsistent with retention in federal ownership. However, the regulations reveal that the term "disposal" covers more than sale or other methods of relinquishing title. A lease, for example, also represents a form of disposal. *See* 43 C.F.R. § 2440.1 ("settlement, location, sale, selection, entry, lease, *or other forms of disposal*" (emphasis added)). A lease might be "consistent with the purposes" of a particular classification for retention for multiple use management. A sale would not. Section 2440.2 thus may simply allow some forms of "disposal" on retained lands which do not undermine Federal ownership.

Similarly, § 2440.3(b) does not necessarily demonstrate that lands classified for multiple use management may be "conveyed out of Federal ownership." Mtn. States Br. at 4-5. The fact that these lands would still be subject to mining "location" does not show that they are also subject to the entire sequence under the mining laws that leads from location to fee ownership. This provision in the regulations weighs only the public interest in the "search" for

mineral deposits. It says nothing about private acquisition of property rights.

Although we disagree with defendants' interpretation of the statute and regulations, we are bound by the terms of the individual classifications defendants have created. Plaintiffs have brought this suit to reverse classification terminations. They have never challenged the terms of the original classifications. In fact, they seek to reinstate the classifications that existed on January 1, 1981. These pre-1981 classifications all outlined their particular segregative effect pursuant to 43 C.F.R. § 2440.1. In some cases the segregation was complete. *See* Mtn. States Ex. A, New Mexico 7633. In others, the segregation provision kept the land open to all forms of "appropriation" except those under enumerated statutes. *See* Mtn. States Ex. A, Montana 944785. It is not clear whether the permissible forms of appropriation included sales or other conveyances of title. However, that issue is irrelevant in the present case. Plaintiffs have asked us to nullify classification terminations since 1981 pending defendants' compliance with the applicable statutes. Plaintiff requests reinstatement, not review. Our order therefore enjoins defendants from "taking any action inconsistent with the *specific* restrictions of a withdrawal or classification in effect on January 1, 1981." (emphasis added). If the specific restrictions of a particular classification condoned some form of "disposal," the terms of the classification again apply.

III. *Motion to Consolidate*

Plaintiff's motion, filed shortly before the hearing, is now moot. We intend to allow the parties to present their respective cases at a permanent injunction hearing to be held as soon as possible. The attached preliminary injunc-

tion order sets a status call to determine the schedule for remaining discovery and any motions that will follow.

Orders consistent with this opinion have been entered this day.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5397

NATIONAL WILDLIFE FEDERATION, APPELLANT

v.

ROBERT F. BURFORD, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

[Filed June 20, 1989]

BEFORE: Edwards and Ruth B. Ginsburg, Circuit Judges, and Kaufman*, Senior District Judge

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District of Columbia and was argued by counsel. On consideration thereof, it is

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* of the United States District Court for the District of Maryland, sitting by designation pursuant to 28 U.S.C. § 294(d).

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded for further proceedings, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:
/s/ Constance L. Dupre
CONSTANCE L. DUPRE, Clerk

Date: June 20, 1989
Opinion for the Court filed by Circuit Judge Edwards

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5291

NATIONAL WILDLIFE FEDERATION

v.

ROBERT F. BURFORD, ET AL.

ASARCO INCORPORATED,
APPLICANT FOR INTERVENTION, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed June 20, 1989]

BEFORE: Edwards and Ruth B. Ginsburg, Circuit Judges, and Kaufman*, Senior District Judge

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District of Columbia and was argued by counsel. On consideration thereof, it is

---

* of the United States District Court for the District of Maryland, sitting by designation pursuant to 28 U.S.C. § 294(d).

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded for further proceedings, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:
/s/ Constance L. Dupre
CONSTANCE L. DUPRE, Clerk

Date: June 20, 1989
Opinion for the Court filed by Circuit Judge Edwards

APPENDIX I-1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5397

NATIONAL WILDLIFE FEDERATION, APPELLANT

v.

ROBERT F. BURFORD, ET AL.

[Filed Dec. 20, 1988]

BEFORE: Starr, Williams and Sentelle, Circuit Judges

ORDER

Upon consideration of appellant's emergency motion for restoration of injunction pending appeal, the oppositions and reply, appellant's motion for summary reversal, the oppositions and reply, and the federal appellees' motion to file an over-sized opposition and the opposition, it is

ORDERED that federal appellees' motion to file an over-sized opposition be granted. The Clerk is directed to file the federal appellees' opposition to the motion for summary reversal. It is

FURTHER ORDERED that restoration of the injunction pending appeal be denied. Appellant has not met the standards necessary for injunctive relief pending appeal.

See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); *D.C. Circuit Handbook of Practice and Internal Procedures* 38 (1987). On the present record, we see no indication that there is any specific area with respect to which the probability of irreparable harm to appellant is great enough to merit an injunction. Therefore, an injunction pending appeal is not warranted. It is

FURTHER ORDERED that the motion for summary reversal be denied. Summary disposition is inappropriate in this case because the merits of the parties' positions are not so clear as to justify expedited action. *See Sills v. Bureau of Prisons*, 761 F.2d 792 (D.C. Cir. 1985); *Ambach v. Bell*, 686 F.2d 974 (D.C. Cir. 1982) (per curiam). It is

FURTHER ORDERED, on the court's own motion, that this appeal be expedited. The court will hear oral argument on March 20, 1988. A briefing order will follow shortly.

PER CURIAM

APPENDIX I-2

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Dec. 8, 1988]

ORDER

Upon consideration of plaintiff's Motion for Restoration of the Injunction Pending Appeal, the opposition thereto, and the entire record herein, it is by the Court this 7th day of December, 1988

ORDERED that plaintiff's motion is hereby denied.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX I-3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Nov. 4, 1988]

ORDER

Upon consideration of the parties' respective motions for summary judgment and oppositions thereto, the hearing thereon held July 22, 1988, and the parties' subsequent submissions on the issue of plaintiff's standing, it is by the Court this 4th day of November, 1988

ORDERED that this Court's grant of a preliminary injunction be vacated, and it is

ORDERED that Defendants' Motion for Summary Judgment be granted; and it is

FURTHER ORDERED that the above action shall stand dismissed for lack of standing.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX I-4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed July 22, 1988]

ORDER

Presently before us is Asarco Incorporated's (Asarco's) Motion to Intervene into this longstanding litigation. Upon consideration of Asarco's motion, the briefs filed by the parties and the record as a whole, and in light of our deterination [*sic*] that Asarco's application for intervention is not timely, as required by Rule 24 of the Federal Rules of Civil Procedure, it is by the court this 22nd day of July, 1988

ORDERED that Asarco [*sic*] motion to intervene by [*sic*] denied.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX I-5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Apr. 8, 1988]

ORDER

Upon consideration of defendant's Motion to Amend our Order of February 10, 1986, as amended by our Order of November 25, 1986, the lack of opposition thereto, and the record as a whole, it is by the court this 8th day of April, 1988

ORDERED that defendants' motion is granted; and it is

FURTHER ORDERED that subparagraph (f) of paragraph 3 of our Order of February 10, 1986, as amended by our Order of November 25, 1986, is further amended to read:

> (3) Nothing in this Order shall be construed to prohibit or affect:
>
> f) the Secretary of the Interior or his designee(s) from complying with the statutory obligations im-

posed on him by Sec. 3 of Pub. L. No. 99-542 (October 27, 1986), Sec. 104 of Pub. L. No. 99-950 [*sic*] (October 30, 1986), Sections 4(a), 4(b), 6 and 7 of Pub. L. No. 99-632 (Nov. 7, 1986), Section 12(h) of Pub. L. No. 99-606 (Nov. 6, 1986) and the last two unnumbered paragraphs under the heading of "Administrative Provisions" in that portion of House Joint Resolution 395, Pub. L. No. 100-202, containing the 1988 Fiscal Year Appropriations for the Bureau of Land Management.

/s/ J. H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX I-6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Jan. 6, 1987]

MEMORANDUM ORDER

Defendant intervenor, The Department of Water and Power of the City of Los Angeles, (LADWP) seeks a declaration that a congressionally approved land exchange between the Department of the Interior and the City of Los Angeles involving federal lands at Haiwee Reservoir in Inyo County, California and the City's Upper Franklin Reservoir property (Haiwee/Franklin Exchange) is not within the scope of this Court's order of February 10, 1986, or alternatively, an amendment to that order which would exempt this land exchange.[1]

---

[1] LADWP also moves for a similar ruling concerning certain geothermal leases authorized by the Geothermal Steam Act of 1970. On December 31, 1986, we granted a motion by California Energy Company on the same grounds proposed by LADWP. By separate order today, we grant LADWP's motion regarding their geothermal leases on Naval Weapons Testing Center lands within the Coso Known Geothermal Resource Area, Inyo County, California.

In 1984, the National Parks and Recreation Act of 1978 (Public Law 95-625), which created the Santa Monica National Recreation Area, was amended specifically to authorize the Haiwee Franklin exchange between the Department of Interior's Bureau of Land Management (BLM) and the City of Los Angeles for the purposes of the Santa Monica Mountains National Recreation Area. *See* 16 U.S.C. § 460kk(c)(2)(B). Under the exchange, the Recreation Area, a 150,000 acre unit of the National Park System, would acquire thirty acres of property owned by the City of Los Angeles, including Upper Franklin Reservoir. *See* LADWP's Memo. at 24. In return, the BLM would convey to the City of Los Angeles certain lands managed by the BLM in the vicinity of the Haiwee Reservoir in Inyo County. 16 U.S.C. § 460kk(c)(2)(B). On June 11, 1986, the exchange had not been consummated and LADWP requested BLM to complete the land exchange. On July 30, 1986, the BLM denied the request on the ground that as of January 1, 1981, the lands to be conveyed by the BLM had been withdrawn, and that in order to complete the exchange, it was necessary to revoke or modify this withdrawal, which BLM could not do. Ex. 8, LADWP's Memo. We agree with the BLM.

Under paragraph 1(b) of the preliminary injunction of February 10, 1986, the Department of Interior is enjoined from "taking any action inconsistent with the specific restrictions of a withdrawal or classification in effect on January 1, 1981 . . . ." While the order disclaims an intention to disturb any transfers of land in fee, it is clear, despite LADWP's contention, that this Haiwee/Franklin exchange was still in the negotiation stage and that no fee

interest had been conveyed prior to January 1, 1981. This holding avoids piecemeal adjudication and is consistent with our prior actions regarding the Trust of Public Land and Sunlight Development Company. As for LADWP's remaining contentions, *i.e.*, plaintiff's lack of standing and failure to show irreparable injury, these cannot now be decided on the present record but must await the disposition of pending motions.

Accordingly, it is by the court this 6th day of January, 1987

ORDERED that LADWP's motion for declaratory and other relief regarding the Haiwee/Franklin land exchange is denied.

/s/ J.H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX I-7

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Jan. 6, 1987]

ORDER

Upon consideration of the motion of Department of Water and Power for the City of Los Angeles, California for relief from preliminary injunction, the supporting memorandums and exhibits submitted and the entire record herein, and it appearing to the court that continued development of the geothermal operations of the Department of Water and Power for the City of Los Angeles on Navel Weapons Testing Center lands within the Coso Known Geothermal Resource Area, Inyo County, California, are not enjoined or otherwise subject to the preliminary injunction entered in this action, it is by the court this 6th day of January, 1987,

ORDERED that the preliminary injunction entered on December 4, 1985, as amended on February 10, 1986, does

not apply to the geothermal operations of the Department of Water and Power for the City of Los Angeles on Naval Weapons Center lands within the Coso Known Geothermal Resource Area, Inyo County, California, and it is

FURTHER ORDERED that The Bureau of Land Management shall forthwith vacate and set aside its suspension order of April 22, 1986, which order directed that the City of Los Angeles cease all proposed and future geothermal operations on the Naval Weapons Testing Center land.

/s/ J.H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX I-8

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

ORDER

Upon consideration of motion of California Energy Company Inc. ("Cal Energy") and the County of Inyo, California, for relief from preliminary injunction, the memorandum of points and authorities and affidavits and exhibits submitted in support thereof, and the memoranda of points and authorities filed by the plaintiff, the federal defendants and the defendant-intervenor, and it appearing to the court that continued development of the geothermal operations of Cal Energy on Naval Weapons Testing Center lands within the Coso Known Geothermal Resource Area, Inyo County, California, are not enjoined or otherwise subject to the preliminary injunction entered in this action, it is hereby

ORDERED and DECLARED that

(1) The preliminary injunction entered on December 4, 1985, as amended on February 10, 1986, does not apply to the geothermal operations of California Energy Com-

pany, Inc. on Naval Weapons Center lands within the Coso Known Geothermal Resource Area, Inyo County, California, and it is

FURTHER ORDERED that

The Bureau of Land Management shall forthwith vacate and set aside its suspension order of 22 April 1986, directing that Cal Energy cease all proposed and future geothermal operations.

/s/ J.H. Pratt
J.H. PRATT
Judge

Signed this 31st day of December, 1986.

APPENDIX I-9

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Nov. 25, 1986]

ORDER

Upon consideration of the November 24, 1986 motion of the defendants to amend this court's order of February 10, 1986, the court noting that the motion is unopposed and being of the opinion that the motion should be granted, it is hereby *ordered* that this court's order of February 10, 1986 is amended to add a new subparagraph (f) to paragraph 3 of that order as follows:

> (f) the Secretary of the Interior or his designee(s) from complying with the statutory obligations imposed on him by Sec. 3 of Pub. L. No. 99-542 (Oct. 27, 1986), Sec. 104 of Pub. L. No. 99-590 (Oct. 30, 1986), Sections 4(a), 4(b), 6, and 7 of Pub. L. No. 99-632 (Nov. 7, 1986) and Section 12(h) of Pub. L. No. 99-606 (Nov. 6, 1986).

Dated this 25th day of November 1986.

/s/ J.H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX I-10

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed July 14, 1986]

ORDER

Upon consideration of plaintiff National Wildlife Federation's motion to quash and for a protective order and defendants' opposition thereto, it is by the court this 11th day of July, 1986,

ORDERED that plaintiff's motion is granted; and it is further

ORDERED that the subpoenas of Kathleen C. Zimmerman and Lynn Greenwalt and any other subpoenas which may have been served upon plaintiff National Wildlife Federation, its members, employees, officers, agents, servants, or attorneys are hereby quashed, and the notices of deposition are vacated; and it is further

ORDERED that no further discovery of plaintiff or its members, officers, employees, agents, servants, or at-

torneys shall be permitted until subsequent order of this court, if any.

/s/ J.H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX I-11

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed May 22, 1986]

ORDER

Upon consideration of the motions by the defendants and defendants-intervenors Mountain States Legal Foundation for a stay of the preliminary injunction pending appeal, plaintiff's opposition, and Mountain States Legal Foundation's reply; and, in accordance with the standard set out in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), finding that defendants-appellants are not likely to prevail on the merits, that while defendants or third parties may be harmed by the injunction, a stay would irreparably harm the plaintiff, and that the public interest favors the continued enforcement of the injunction, it is by the court this 21st day of May, 1986,

ORDERED that the motions for a stay of the preliminary injunction are hereby denied.

/s/ J.H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX I-12

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, DONALD P. HODEL, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS,

AND

MOUNTAIN STATES LEGAL FOUNDATION, A NONPROFIT COLORADO CORPORATION, ON BEHALF OF NAMED AND UNNAMED MEMBERS AND THE MINERALS EXPLORATION COALTION, INC., A NONPROFIT COLORADO CORPORATION, ON BEHALF OF NAMED AND UNNAMED MEMBERS, DEFENDANT-INTERVENORS.

[Filed May 5, 1986]

ORDER

Upon consideration of Plaintiff's motion to voluntarily dismiss, the Court finds that Plaintiff's action is inappropriate for voluntary dismissal under Fed. R. Civ. P. 41(a) as to the tract of public lands to be exchanged by the

United States Forest Service to the Sunlight Development Company, it is therefore

ORDERED that Plaintiff's motion for voluntary dismissal is denied.

Signed this 30th day of April, 1986.

/s/ J.H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX I-13

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Mar. 6, 1986]

ORDER

Upon consideration of the motion of the Trust for Public Land to intervene in this action as a defendant, the statement of points and authorities submitted in support thereof, and the memorandum in response submitted by plaintiff, it is hereby

ORDERED, that the motion to intervene is granted pursuant to Fed. R. Civ. P. 24(b)(2) for the limited purpose of determining whether the Trust for Public Land's proposed land exchange with the United States Forest Service is prohibited under the terms of this Court's Order of February 10, 1986; and it is further

ORDERED that the federal defendants' issuance of a patent with respect to the Trust for Public Land's ex-

change is not exempt under the terms of the Court's Order of February 10, 1986.

Signed this 6th day of March, 1986.

/s/ J.H. Pratt
J.H. PRATT
United States District Judge

APPENDIX I-14

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Feb. 10, 1986]

ORDER

Upon consideration of the motions by the federal defendants and by defendant-intervenor Mountain States Legal Foundation for reconsidcration and the motion by Mountain States Legal Foundation to amend the judgment to certify the issue of joinder to the Court of Appeals, and for reasons set out in the accompanying opinion, it is by the court this 10th day of February, 1986,

ORDERED that the motions are all denied.

/s/ J.H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX I-15

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Feb. 10, 1986]

ORDER

Upon consideration of plaintiff's motion for a preliminary injunction, defendants' opposition and plaintiff's reply, and

Finding that a preliminary injunction is necessary to preserve the relative positions of the parties until this case can be decided on the merits, and further

Finding that the plaintiff has shown a substantial likelihood of success on the merits, and further

Finding that plaintiff will suffer irreparable harm if the requested injunction is not issued, and further

Finding that issuance of the requested injunction would serve the public interest, it is by the court this 10th day of February, 1986,

ORDERED that plaintiff's motion for a preliminary injunction is granted, and it is

ORDERED that

(1) Defendants, their officers, agents, servants, employees, and attorneys and those persons in active concert or participation with them are hereby enjoined from:

(a) modifying, terminating or revoking, in full or in part, under the Federal Land Policy and Management Act (FLPMA), any withdrawal or classification that was in effect on January 1, 1981; or

(b) taking any action inconsistent with the specific restrictions of a withdrawal or classification in effect on January 1, 1981, including, but not limited to, the issuance of leases, the sale, exchange or disposal of land or interests in land, the granting of rights-of-way, or the approval of any plan of operations;

(2) Terminations or modifications under the FLPMA of classifications and revocations or modifications under the FLPMA of withdrawals occurring since January 1, 1981, are hereby suspended until further action by this court;

(3) Nothing in this order shall be construed to prohibit or affect:

(a) The acceptance by the Department of the Interior of filings required to be made by Federal law;

(b) State selection and conveyance rights afforded to the State of Alaska by § 906 of the Alaska National Interest Lands Conservation Act, 94 Stat. 2371, or

(c) Native conveyance rights afforded to Alaskan natives by the Alaska Native Claims Settlement Act, 85 Stat. 688, and the Alaska National Interest Lands Conservation Act, 94 Stat. 2371;

(d) The construction of the All American Pipeline project pursuant to a right-of-way grant issued by the Bureau of Land Managment on May 17, 1985;

(e) Any transactions or other activity on the Frisco Administrative Site No. 2 S1/2SE1/4, Section 26, Township 5 South, Range 78 West of the Sixth Principal Meridian in Summit County, Colorado.

(4) Defendants shall forthwith cause of copy of this order to be published in the *Federal Register* and posted and made available to the public in defendants' offices in any State where this order might affect any person.

(5) Pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, plaintiff shall post security for this injunction in the amount of one hundred dollars ($100.00).

(6) Nothing in this order shall be construed to affect any party's right to appeal this order.

(7) This preliminary injunction shall take effect upon publication in the *Federal Register* or on the fifth day after this order is filed, whichever day occurs sooner, and it is

FURTHER ORDERED that the parties shall appear for a status call on February 19, 1986 at 9:30 a.m., Courtroom No. 12, United States Courthouse.

/s/ J.H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX I-16

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Dec. 4, 1985]

ORDER

Upon consideration of the motion to intervene of Chairman John F. Seiberling of the House Committee on Public Lands, the response thereto, and the record herein, it is by the court this 4th day of December, 1985,

ORDERED that the motion to intervene of Congressman Seiberling be and the same hereby is granted.

/s/ J.H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX I-17

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Dec. 4, 1985]

ORDER

Upon consideration of defendants' motion to dismiss for failure to join indispensible parties and for lack of standing, plaintiff's opposition and defendants' reply and upon hearing the parties on September 16, 1985, it is by the court this 4th day of December, 1985,

ORDERED that defendants' motion to dismiss is hereby denied.

/s/ J.H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX I-18

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Dec. 4, 1985]

ORDER

Upon consideration of plaintiff's motion for a preliminary injunction, defendants' opposition thereto and plaintiff's reply, and

Finding that a preliminary injunction is necessary to preserve the relative positions of the parties until this case can be decided on the merits, and further

Finding that the plaintiff has shown a substantial likelihood of success on the merits, and further

Finding that plaintiff will suffer irreparable harm if the requested injunction is not issued, and further

Finding that issuance of the requested injunction would serve the public interest, it is by the court this 4th day of December, 1985

ORDERED that plaintiff's motion for a preliminary injunction is granted, and it is

ORDERED that as used in this order, the terms "public lands" and "withdrawal" shall have the meaning given them by the Federal Land Policy and Management Act, 43 U.S.C. § 1702(e), (j), and it is

ORDERED that the defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them are hereby enjoined from:

1. Modifying, terminating or altering any withdrawal, classification, or other designation governing the protection of lands in the public domain that was in effect on January 1, 1981, or

2. Taking any action inconsistent with any withdrawal, classification, or other designation governing the protection of lands in the public domain that was in effect on January 1, 1981, including, but not limited to, the issuance of leases, the sale, exchange or disposal of land or interests in land, the grant of rights-of-way, or the approval of any plan of operations; and it is

ORDERED that all persons holding interests, including but not limited to, ownership, possession, mining claims and their development, leases and rights-of-way, in lands that were the subject of classification terminations or withdrawal revocations since January 1, 1981 are hereby enjoined from taking any action inconsistent with the present status quo of these lands, including but not limited to, the staking of additional mining claims, obtaining new leases, mining, timber removal, land clearing, construction, or other forms of development; and it is

ORDERED that the defendants shall forthwith cause a copy of this order to be published in the *Federal Register* and posted and made available to the public in defendants' offices in any state where this order might affect any person; and it is

ORDERED that pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, plaintiff shall post security for this injunction in the amount of one hundred ($100.00) dollars, and it is

FURTHER ORDERED that a status call is scheduled for Monday, January 6, 1986 at 9:30 a.m., Courtroom No. 12, United States Courthouse.

/s/ J.H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX I-19

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

AFFIDAVIT OF RICHARD LOREN ERMAN

I, Richard Loren Erman, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF) and its affiliate the Arizona Wildlife Federation.

2. I reside at 3435 East Windrose Drive, Phoeniz, Arizona 85032.

3. I use the federal lands, including those in the vicinity of the Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest for recreational pruposes and for aesthetic enjoyment.

4. My recreational use and aesthetic enjoyment of these lands depends upon their management and enhancement by the Bureau of Land Management and the United States Department of the Interior. Therefore, I am particularly concerned about the compliance of these agencies with

laws pertaining to the preservation, protection, and enhancement of the federal lands and resources they administer. I am also interested in participating in their decisions affecting these lands. For example, I assisted in the preparation of comments submitted by the Arizona Wildlife Federation on the Tonto National Forest Land Management Plan, the Coconino National Forest Land Management Plan, and the Bureau's Lower Gila Resource Management Plan.

5. I am aware that the National Wildlife Federation has filed a lawsuit against the Bureau of Land Management (Bureau) and the Department of the Interior (Department) for unlawfully terminating protective land use classifications and other withdrawals on federal lands pursuant to their Land Withdrawal Review Program.

6. My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of Grand Canyon National Park and the Arizona Strip have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the Arizona Strip has been opened to the staking of mining claims, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

7. My interest in seeing that the laws pertaining to the preservation, protection, and enhancement of federal lands and their natural resources are complied with has been adversely affected by the unlawful actions of the Bureau and the Department.

8. My interest in participating in decisions affecting the preservation, protection, and enhancement of federal lands and their natural resources has been adversely affected by the failure of the Bureau and the Department to provide notice of their proposals to terminate classifications and other withdrawals and to provide opportunities for public involvement in the development and execution of the Land Withdrawal Review Program.

9. Given my recreational use and aesthetic enjoyment of the federal lands and their natural resources, my concern in ensuring that the laws pertaining to their preservation, protection, and enhancement are enforced, and my interest in participating in decisions affecting their future management, my interests are being fully and adequately represented by NWF in its lawsuit against the Bureau and the Department and my interests will be fairly redressed by a decision favorable to NWF.

/s/ RICHARD L. ERMAN
Richard L. Erman

Subscribed and sworn to before me
this day of April, 1986.

/s/ Cecilia M. Perz
Notary Public

My commission expires on October 26, 1966.

APPENDIX I-20

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

AFFIDAVIT OF PEGGY KAY PETERSON

I, Peggy Kay Peterson, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF) and its affiliate the Wyoming Wildlife Federation.

2. I reside at 3519 Partridge Lane, Casper Wyoming 82604.

3. I use the federal lands, including those in the vicinity of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment.

4. My recreational use and aesthetic enjoyment of these lands depends upon their management and enhancement by the Bureau of Land Management and the United States Department of the Interior. Therefore, I am particularly concerned about the compliance of these agencies with laws pertaining to the preservation and protection of the

federal lands they administer. I am also interested in participating in their decisions affecting these lands. For example, I assisted in the preparation of comments submitted by the Wyoming Wildlife Federation on the Bureau's Draft Lander Resource Management Plan.

5. I am aware that the National Wildlife Federation has filed a lawsuit against the Bureau of Land Management (Bureau) and the Department of the Interior (Department) for unlawfully terminating protective land use classifications and other withdrawals on federal lands pursuant to their Land Withdrawal Review Program.

6. My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

7. My interest in seeing that the laws pertaining to the preservation and protection of federal lands and their natural resources are complied with has been adversely affected by the unlawful actions of the Bureau and the Department.

8. My interest in participating in decisions affecting the preservation and protection of federal lands has been adversely affected by the failure of the Bureau and the Department to provide notice of their proposals to terminate classifications and other withdrawals and to provide opportunities for public involvement in the development and execution of the Land Withdrawal Review Program.

9. Given my recreational use and aesthetic enjoyment of the federal lands, my concern in ensuring that the laws

pertaining to their preservation and protection are enforced, and my interest in participating in decisions affecting their future management, my interests are being fully and adequately represented by NWF in its lawsuit against the Bureau and the Department and my interests will be fairly redressed by a decision favorable to NWF.

/s/ PEGGY KAY PETERSON
Peggy Kay Peterson

Subscribed and sworn to before me
this 7th day of April, 1986.

/s/ Connie L. Maves
Notary Public

My commission expires on March 29, 1988.

APPENDIX I-21

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

DECLARATION OF LYNN A. GREENWALT

I, Lynn A. Greenwalt, am the Vice President for Resources Conservation of the National Wildlife Federation (NWF). In that capacity, I am directly responsible for supervising all of the advocacy and litigation activities of NWF.

2. NWF is the largest, non-governmental conservation/education organization in the United States with over 4.5 million members and supporters and 51 affiliate organizations. Many of these members use the federal lands for recreational purposes and for aesthetic enjoyment.

3. NWF is dedicated to the conservation and wise use of the nation's natural resources. To that end, NWF maintains an active education program to inform its members and the general public about conservation issues, including natural resource management on federal lands. For example, in 1985, NWF published a report on the con-

dition of public rangelands. NWF's members have contributed financially to the organization, in part, so that they may obtain information on conservation issues.

4. NWF also represents its membership in advocating improvements in federal and state statutes, regulations, and procedures pertaining to the protection and enhancement of federal lands. For example, NWF supported passage of the Federal Land Policy and Management Act. Since the enactment of these laws, NWF's professional staff has represented its membership by monitoring the implementation of these laws and in ensuring that related federal and state environmental laws are properly interpreted, implemented, and enforced. NWF members have contributed financially to the organization, in part, so that they may obtain adequate representation of their legally-protected environmental interests, which representation they may not otherwise individually obtain.

5. NWF's ability to meet these obligations to its members has been significantly impaired by the failure of the Bureau of Land Management and the Department of the Interior to provide adequate information and opportunities for public participation with respect to the Land Withdrawal Review Program. These interests of NWF have been injured by the actions of the Bureau and the Department and would be irreparably harmed by the continued failure to provide meaningful opportunities for public input and access to information regarding the Land Withdrawal Review Program. The interests of NWF will be addressed by a decision favorable to NWF in this lawsuit.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 16th day of May, 1986.

/s/ LYNN A. GREENWALT
Lynn A. Greenwalt

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